Case No. 2828.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS.

Upon Appeal from the District Court for the Territory of Alaska, Division No. 1.

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IN THE

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STATEMENT OF FACTS.

This is an appeal from a decree entered by the District Court for the Territory of Alaska, enjoining the appellants from maintaining a fish trap situate in the navigable waters of the United States to the seaward of the westerly shore of Annette Island.

Annette Island forms part of the Alexander Archipelago and is situate near the southernmost boundary line of Alaska. On it is situate the Indian village of Metlakahtla, founded in about the year 1886 by a

colony of Indians under the leadership of Father Duncan. These Indians migrated to Annette Island from a village in British Columbia known as "Old Metlakahtla." Some years prior to 1886 Father Duncan had proceeded to Old Metlakahtla, British Columbia, as a missionary. He had made a great deal of progress in teaching the Indians useful trades and occupations and otherwise inducing them to adopt the habits of civilization, when some dispute arose between him and the Bishop, who was his superior in this particular field, which resulted in the recall of the former. After being thus deposed Father Duncan gathered about him a colony of the Metlakahtla Indians and emigrated from British Columbia to Annette Island, Alaska. This was about the year 1886.

In the year 1887, the matter having been called to the attention of the Interior Department, the Secretary of the Interior addressed an inquiry to the Attorney General with a view of ascertaining whether the President could not by proclamation set aside Annette Island for the use and benefit of the Metlakahtla Indians. The Attorney General, being of the opinion that the President could not reserve lands for the use of British Columbia Indians, the matter was submitted to Congress with the result that an Act setting aside Annette Island for the use of the Metlakahtlans was passed.

Under the leadership of Father Duncan the Metlakahtla Indians built the village of New Metla-

kahtla on Annette Island. A church, school house and store building, as well as numerous Indian houses were erected, and in more recent years a cannery and a saw mill. This cannery and saw mill were operated for several years, until about three years ago, when the Bureau of Education deposed Father Duncan from the leadership of the Metlakahtlans and placed another person in charge of their affairs. This action on the part of the Bureau of Education was followed by a chaotic condition in the affairs of the Metlakahtlans. Neither the cannery nor saw mill were since operated. Strife, finding its origin on the one hand in wounded pride and a growing sense of injustice, and on the other in a desire for power, was waged continuously between the deposed leader and the Bureau of Education.

In the spring of 1916, after the inability of the Bureau of Education to operate the cannery as it had been operated by Father Duncan was clearly demonstrated by the fact that the cannery had been continuously idle since the Bureau had taken charge of it, arrangements were made to lease the cannery to a white man named P. E. Harris, who was also operating another cannery in the waters of Southeastern Alaska. After the cannery had been so leased to a white cannery operator, a private fishery was created by Executive Proclamation in the waters surrounding Annette Island, ostensibly for the benefit of the Metlakahtla Indians. The cannery having been leased to

a white man, however, the lessee of the cannery became the real beneficiary under this Executive Proclamation.

The Alaska Pacific Fisheries, the appellant, is the owner of three salmon canneries situate in Southeastern Alaska. Two of these canneries, one situate at Yes Bay and the other at Chomly Sound, more especially the latter, depend for their fish supply in part upon salmon caught in the waters surrounding Annette Island.

Prior to the year 1916 these fish had been caught principally in the fish trap referred to in the evidence as the Brendible trap. In August, 1915, pursuant to observations that had been previously made, and which had established the fact that the navigable waters off Cedar Point afforded a valuable site for a fish trap, the officers and agents of the appellant by the aid of a diver explored the bed of the ocean with a view of determining whether a fish trap could be driven in that locality (See evidence Burckhardt, Record, page 86). Having ascertained that this could be done, steps were taken in the fall of 1915 to procure the necessary piles. It was calculated that this trap would, when in operation, catch 600,000 fish during the fishing season. Accordingly appellant's cannery at Chomly was, during the winter of 1915 and 1916, enlarged sufficiently and the necessary machinery installed to can this additional supply of fresh salmon at an expense of eighteen thousand five hundred

($18,500.00) dollars (See evidence Burckhardt, Record, page 114). During this same winter contracts were also made for the additional Chinese labor necessary to put up this increased pack, and tin and other supplies required in that connection were purchased and shipped to Chomly (See evidence Burckhardt, Record, pages 87 and 89).

On the 7th day of April, 1916, the work of driving the piles for the trap off Cedar Point was commenced, and this work was completed on the 18th day of April, 1916 (See Finding No. 2, Record, page 188, evidence Burckhardt, Record, page 87, and evidence Jenkins, Record, page 152). Following this and on the 28th day of April, 1916, the President's proclamation, hereinabove referred to, was issued.

The trap, as constructed, is situate in the navigable waters of the United States so far to the seaward from the westerly coast of Annette Island that the portion of the trap nearest to the shore is two hundred (200) feet to the seaward of the line of extreme low tide (See Finding No. 2, Record, page 119), and the entire trap is embraced within the area referred to in the President's proclamation.

After the issuance of the proclamation, the appellant was requested to cease carrying on its fishing operations within the area referred to in the President's proclamation, and upon its failure so to do, this suit was brought to enjoin it from maintaining and operating the fish trap above referred to. The lower

court entered a decree prohibiting the appellant from going upon any of the waters surrounding Annette Island within three thousand feet of the shore thereof, and compelling it to remove whatever structures it had placed and was maintaining within this area. This appeal is from the decree so entered.

ERRORS ASSIGNED.

Twelve errors are assigned which read as follows:

FIRST ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 1 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 1, which said proposed Finding of Fact No. 1 is in words and figures as follows:

"Defendant's Proposed Finding No. 1.

"The Court finds that in August of the year 1915 the defendants, pursuant to observations previously made, went upon the present site of the defendants' fish trap off Cedar Point, Annette Island, and made soundings and by the use of a diver made such observations as were necessary to determine the question of feasibility of constructing a fish trap at that place, and in this connection the Court finds that as the result of such observations the defendants decided that the driving and constructing of a fish trap upon the site now occupied by the defendants' trap was practicable and feasible."

SECOND ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 2 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 2, which said proposed Finding of Fact No. 2 is in words and figures as follows:

"Defendants' Proposed Finding No. 2.

"The Court finds that pursuant to and subsequent to the observations made in the month of August, 1915, referred to in Defendants' Proposed Finding No. 1, the defendants decided to drive and construct a fish trap upon the site now occupied by the defendants' trap and to enlarge their cannery at Chomly by installing therein such additional machinery and equipments as were necessary to pack the fish that would be caught and supplied by the fish trap to be constructed off Cedar Point; that in the fall of 1915, and the winter of 1915-16, the Chomly cannery of the defendants was so enlarged and so supplied with additional equipment and machinery at an expense of approximately eighteen thousand five hundred ($18,500) dollars.

"That in the judgment of the defendants the trap to be constructed off Cedar Point would supply 600,000 fish which, when canned, would fill 50,000 cases of canned salmon; that the defendants during the winter of 1915-16 contracted for the Chinese labor and purchased the tin and other supplies necessary to the canning of the said additional 50,000 cases of salmon at Chomly, at an expense to the defendants considerably in excess of twenty-five thousand ($25,000) dollars."

THIRD ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 3 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 3, which said proposed Finding of Fact No. 3 is in words and figures as follows:

"Defendants' Proposed Finding No. 3.

"That during the winter of 1915-16 the defendants procured the necessary piles and other equipment to drive and construct a trap off Cedar Point upon the site of the defendants' present trap, and on the 7th day of April in the spring of the year 1916 commenced the driving of such trap and completed the driving thereof on the 18th day of April, 1916, and that the defendants expended in this behalf a sum in excess of four thousand ($4,000) dollars."

FOURTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 4 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 4, which said proposed Finding of Fact No. 4 is in words and figures as follows:

"Defendants' Proposed Finding No. 4.

"That all available sites for fish traps, so far as known to the defendants, within the area from

which fish can be supplied to the Chomly cannery of the defendants, have been occupied and there are no salmon to be purchased upon the market within the area from which such salmon can be taken to Chomly and canned in order to furnish the Chomly cannery with the fish necessary to fill the 50,000 cases representing the increased capacity of the cannery."

FIFTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One erred in making and adopting its Finding of Fact No. 1 and in finding the facts as in said Finding No. 1 stated, which Finding No. 1 as made by the court is in words and figures as follows:

"That by the 15th section of the Act of Congress approved March 3, 1891, entitled 'An Act to Repeal the Timber Culture Laws' (26 Stats. L., 1101), and by the Proclamation of the President dated the 28th day of April, 1916, there was reserved from use, occupation, settlement or benefit by any except Metlakahtlans and other Indians, the following lands and waters, to wit: 'The body of lands known as Annette Islands, situate in the Alexander Archipelago, in Southeastern Alaska, on the north side of Dixon's Entrance' and 'the waters within 3000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets' and 'the bays of the said islands, rocks and islets'; and that by said Proclamation warning was 'expressly given to all unauthorized persons not to fish in or use any of said waters.' "

SIXTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 3 and in finding the facts as in said Finding No. 3 stated, which Finding No. 3 as made by the court is in words and figures as follows:

> "That prior to the issuance of the Proclamation hereinbefore mentioned, T. A. Heckman, superintendent of the defendant company, stated to P. E. Harris that he knew that a Proclamation in the premises was about to be issued by the Government."

SEVENTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 5 and in finding the facts as in said Finding No. 5 stated, which Finding No. 5 as made by the court is in words and figures as follows:

> "That notwithstanding said Act, Proclamation and notice, said defendant did maintain at the time of the filing of this suit, and does now maintain, possession of the area enclosed by said piles and refuses to remove the same, and refuses to vacate the premises, and threatens and is about to and will, if not enjoined, perfect said trap as a fishing device and will catch therein large numbers of valuable fish, and will further trespass upon said land and water so reserved as aforesaid,

to the irreparable injury of plaintiff, both in its sovereign capacity and as owner and proprietor, for which plaintiff would have no plain, speedy or adequate remedy at law."

EIGHTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 1 requested by the defendants, which said Defendants' Proposed Conclusion of Law No. 1, is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 1.

"The Court holds as a matter of law that in the construction of a fish trap off Cedar Point, Annette Island, and the maintenance thereof, the defendants were engaged in the exercise of their common right of fishery, and being so engaged in the exercise of a lawful right they acquired a vested right in said fish trap from which they could not be devested by a subsequent Proclamation of the President or otherwise without compensation."

NINTH ERROR ASSIGNED.

This District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 2 requested by the defend-

ants, which said Defendants' Proposed Conclusion of Law No. 2 is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 2.

"The Court concludes as a matter of law that the reservation of Annette Island as made by Act of Congress March 3, 1891, reserved the lands to ordinary high water mark only and did not include any of the navigable waters of the United States, and that the Proclamation of the President referred to in the pleadings herein was made without authority of law, in that the power to control and dispose of the territories and other property of the United States is by the constitution vested in Congress."

TENTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 3 requested by the defendants, which said Defendants' Proposed Conclusion of Law No. 3 is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 3.

"From the facts found the Court concludes that the plaintiff is not entitled to the relief demanded or to any relief whatsoever."

ELEVENTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in concluding as a matter of law and making and entering its Conclusion of Law, which is in words and figures as follows:

"That plaintiff is entitled to an injunction as prayed for in the Complaint."

TWELFTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in entering its judgment and decree herein, which is in words and figures as follows:

"In the District Court for the District of Alaska, Division No. One, at Juneau.

"United States of America, Plaintiff, vs. Alaska Pacific Fisheries, a corporation, et al., Defendants. No. 1468-A.

INJUNCTION AND FINAL DECREE.

"This cause coming on to be heard heretofore, to wit, on the 15th day of June, 1916, by consent of the parties on the issues raised on the bill, answer and reply and on the motion theretofore filed for an injunction, and the Court having heard the evidence introduced by the respective parties, and the cause having been finally submitted to the Court on the 17th day of June, 1916, and the Court having duly considered the same and heretofore having filed its Opinion herein and having made its Findings of Fact and Conclusions of Law herein, now upon motion of the plaintiff,

"It is hereby ordered and decreed that the Alaska Pacific Fisheries, a corporation, its officers,

agents, employes, and all persons acting by, through or under it or in privity with it, be and they are enjoined and restrained from doing any act or thing whatsoever in driving, constructing or completing any fish trap or structure whatsoever on and at Annette Islands reservation or in the waters appurtenant thereto or surrounding the same and being the waters within 3000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets, all in Southeastern Alaska, and from maintaining or operating any trap or structure for fishing therein, and from fishing there in any manner whatsoever, and particularly from driving, operating, completing or maintaining a fish trap at or near Cedar Point, Annette Island, aforesaid, and from delivering or causing to be delivered any material whatsoever for the construction of fishing traps upon said reserve or in said waters.

"And it is further ordered and decreed that the defendant, the Alaska Pacific Fisheries, be and it is hereby ordered to vacate the lands and waters mentioned in the Proclamation of the President of the United States of April 28, 1916, and to remove therefrom, and to remove any and all structures therefrom heretofore erected therein by it directly or indirectly, and to refrain from in any manner trespassing in and upon said waters and said reserve.

"And it is ordered that plaintiff herein have judgment for its costs and disbursements in this suit; and hereof let execution issue. Defendant is allowed 60 days from this date within which to file proposed Bill of Exceptions.

"Done in open court this 7th day of July, 1916.

"ROBERT W. JENNINGS,
"District Judge."

ARGUMENT.

The first four errors assigned relate to the refusal of the Court to make and adopt the Findings of Fact therein referred to at the request of the appellant. Under the Alaska code the Court is required to make Findings of Fact upon all material matters presented by the pleadings. When the legal propositions presented are discussed, it will be made to appear not only that the facts referred to in each of these proposed Findings of Fact are material to a determination of this cause, but also that in each case the proposed Finding of Fact is in accord with the undisputed testimony given by the witnesses. These first four errors will not therefore be separately discussed. Since this Court can and will go into the record to ascertain what the facts are in relation to matters not covered by the Findings of the trial court, the refusal of the trial court to make findings in any given case may not seriously prejudice the party requesting them, but notwithstanding this the trial court should follow the statute and find all the material facts even where the evidence in relation to these facts is undisputed, especially when expressly requested to do so; since this would save this court and counsel much labor when the case is reviewed on appeal.

The next three errors assigned relate to some of the Findings of Fact made by the Court. Findings of Fact in equity cases are made reviewable by Chapter 35, page 80, of the Acts of the second Territorial

Legislature. But as these three Findings of Fact insofar as they are material are conclusions of law rather than Findings of Fact, and since the legal questions presented are the same as those presented by the remaining errors assigned, it is not necessary that they should be separately discussed.

The remaining five errors assigned relate to the refusal of the Court to adopt as its Conclusions of Law certain legal conclusions requested by the appellant, to the adoption of Conclusions by the Court over the objection of appellant, and the entering of the decree.

The errors thus assigned can most conveniently be presented together. They present four legal propositions for consideration. The first of these relates to the question of whether or not the Act of Congress passed in 1887, was such as to make it unlawful for the appellant to construct the fish trap, the maintenance of which was enjoined. The second proposition relates to the validity of the President's proclamation. The third proposition concerns the question of whether or not the appellant did not, under the circumstances in the case, have a vested right to its fish trap of which it could not be deprived by the President's proclamation. And the fourth proposition relates to the question of whether the appellant was required under the provisions of the "Rivers and Harbors" Act to secure a permit from the Secretary of War to construct its fish trap in order to make its

construction and maintenance lawful. These propositions will be discussed in their order.

1. THE EFFECT OF THE ACT OF CONGRESS OF MAY, 1887.

The language of this Act is as follows:

> "That until otherwise provided by law the body of lands known as Annette Islands, situate in Alexander Archipelago, in southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions as may be prescribed from time to time by the Secretary of the Interior."

The Act relates only to "the body of lands known as Annette Islands." Appellant's fish trap is constructed in an arm of the ocean, its shoremost portion being 200 feet to the seaward from the line of extreme low tide.

An island is a body of land surrounded by water, and the water by which it is surrounded forms no part of it. Moreover the effect of the Act is by its terms expressly limited to the "lands known as Annette Islands," precluding the idea that the waters surrounding Annette Islands were to come within its terms. Again, it is a familiar rule of construction that grantees of lands bordering upon navigable

waters take to the line of ordinary high tide only. *Shively* v. *Bowlby,* 152 U. S., 1. Nor is it material to a consideration of this case whether such grantees take to the line of ordinary high tide or to low water mark, as the appellant's fish trap is situate in deep water 200 feet to the seaward of the line of extreme low tide.

The learned trial Judge, however, expressed the opinion that this Act of Congress set aside not only Annette Island, but also the surrounding waters for the exclusive use of the Metlakahtlans as a private fishery.

In support of this view it is said in the opinion:

> "In passing this Act Congress must have known (what everyone else knew), that the Indians of Alaska are fisher-folk and hunters and trappers and largely, if not entirely depend for their livelihood upon the yield of such vocations."

It is then urged that the Indian could not subsist without fish. Because of this it is urged that it was the intention of Congress—not to give the Metlakahtlans a right to use the waters of Alaska in common with other Indians and white persons as a common fishery—but to give them a private right of fishery in the waters surrounding Annette Island from which all other Indians, as well as whites, were to be excluded.

This conclusion of the learned trial Judge is unwarranted. While it is true that Congress, and every-

one else, knew that the Alaska Indians were "fisher-folk," it is equally true that Congress, and everyone else, knew that the waters surrounding Annette Island were not such as were, at the time of the passage of the Act, used by the Indians as a place within which to catch fish; and also that even if such waters were suitable as an Indian fishing ground, it would be a gross injustice to reserve them exclusively for the Metlakahtlans, a foreign tribe of Indians, and prevent the native Alaska Indians, who had always lived in Alaska and who were also "fisher-folk" from fishing therein—to say nothing about the rights of the white fisherman, who were also "fisher-folk," and had as American citizens a common right of fishing in these waters.

Annette Island is surrounded on all sides by the deep waters of the ocean. The fish pass through these waters on their way to the spawning grounds, situate at the head of the streams. These fish may be intercepted and caught by the use of fish traps, but Congress, and everyone else, knew that, at the time of the passage of the Act, these Indian "fisher-folk" knew nothing about the use of a fish trap. Yet without resorting to the use of a fish trap the fish in these waters could not be caught (See evidence Burckhardt, Record, page 116).

At the time of the passage of the Act, and even now, except when employed in connection with the operation of some cannery, the Indian caught and still

catches salmon by primitive methods, such as the gaff and spear. He did not, and does not now except in the cases mentioned, fish in the deep waters of the ocean, or its arms, but in the streams where the salmon can be captured without resorting to the use of appliances other than those in use by the Indian. During the fishing season the Indians leave their villages in the canoes and gather on the banks of the streams. There they catch their fish and dry them; and, the fishing season over, they load their canoes with the dried salmon and return to their respective villages.

Surely Congress did not intend to reserve for the Metlakahtlans a private fishery that would not and could not be of use to them; to so contend would, in the language of the learned trial Judge, be "to say that Congress is engaged in the business of luring the unsuspecting, of cheating and deceiving them."

Moreover the learned trial Judge erred in assuming that the Metlakahtlans required a private fishery either in the water surrounding Annette Island or elsewhere, in order to supply themselves with food. At the time of the passage of this Act there were, and still are, thousands of Alaska Indians residing in Indian villages located here and there in the sheltered nooks both on the mainland and on the islands. These Indians had always supplied themselves with food fish by exercising their common right of fishery. The Metlakahtlans could do likewise, or they could fish in the adjoining British Columbia waters as they had

been accustomed to do. They had therefore at the time of the passage of the Act about as much need for a private fishery as they have for fleas in Italy.

Again the learned trial Judge contended that good faith required the Act to be so construed as to create for the Metlakahtlans this private fishery, for the reason that they were invited to come to Annette Island. But these Indians were not invited to come; they emigrated from British Columbia to Annette Island before Congress took any notice of them. The Act itself refers to them as "Those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska." No invitation was extended to them—they were already there.

There were then, as now, Indian villages on practically every island in Southeastern Alaska as well as on the mainland. To these Indians the Government owed the same duties that it owed to the aboriginal tribes, originally inhabiting other portions of the United States; but it owed no such duties to the Metlakahtlans, for these Indians were not original inhabitants of the United States, but of British Columbia.

The Metlakahtlans invaded our territory and took possession of one of the most beautiful and most favorably situated islands in all Alaska, without our invitation and without our consent. Of such the poet said: "Unbidden guests are welcomest when they are gone." And when it comes to a participation in

the bounty bestowed by our Government upon our own native Indian tribes, they occupy the position of those "Who shove, climb, and intrude into the fold." In that regard they always were and still are "Scramblers at the shearers' feast."

As a matter of sheer generosity, and not because of any duty it owed them, Congress gave the Metlakahtlans the right to occupy Annette Island to the exclusion not only of the whites, but also of the Alaska Indians except only such as were willing to join the Metlakahtlan Tribe. If the question of fishery rights was considered at all it is possible that it was the then intention of Congress that these new-comers should enjoy the common right of fishery in the waters of Alaska along with the Alaska Indians and the whites, but it is more probable that it was the intention of Congress that the Metlakahtlans should continue to fish in the waters of British Columbia as they had been accustomed to do when residing at Old Metlakahtla. These waters lie immediately to the south of Annette Island, and it would work no hardship on the Metlakahtlans to be compelled to catch their fish supply there: That this was the intention of Congress is borne out by subsequent legislation. In the year 1906 Congress passed Section 254 of the Compiled Laws of Alaska, which reads as follows:

> "Sec. 254. That it shall be unlawful for any person not a citizen of the United States, or who has declared his intention to become a citizen of the United States, and is not a bona fide resident

> therein, or for any company, corporation, or association not organized or authorized to transact business under the laws of the United States or under the laws of any State, Territory, or district thereof, or for any person not a native of Alaska, to catch or kill, or attempt to catch or kill, except with rod, spear, or gaff, any fish of any kind or species whatever, in any of the waters of Alaska under the jurisdiction of the United States."

Under the provision of this Act it is made unlawful for those not citizens to catch fish in the waters of Alaska. An exception is made in favor of such as are natives of Alaska, but no exception is made in favor of the Metlakahtlans, who are natives of British Columbia. In the face of this Act it cannot be contended that it was the intention that the water surrounding Annette Island should be used by the Metlakahtlans exclusively, for Congress would not create a private fishery for the latter and then make it a crime for them to enjoy the private fishery thus created.

Nor did the officers of the Government called on to construe this Act of Congress place on it the construction placed thereon by the learned trial Judge, for, if in their judgment a private fishery already existed under the Act, there would be no occasion for an executive proclamation creating such a fishery. The contention that it was the purpose of the proclamation merely to define the boundaries and extent of the fishery already existing under the Act is not

borne out by the language of the proclamation itself. It provides that "whereas the Secretary of the Interior "is desirous of placing a cannery in operation on "Annette Island it is necessary that the fishery in the "contiguous waters be reserved for the purpose of sup- "plying fish and other acquatic products for this can- "nery." The proclamation then proceeds to create a private fishery for the use of the Metlakahtlans, not to define a fishery already created.

There is no valid reasan why the rule applied in *Shively* v. *Bowlby,* that the grantee of lands bounded by navigable water takes to the line of ordinary high tide only, should not be applied in this case. The objection that this is not a grant by the Government of the title to the land itself does not go to the substance of the matter. When Congress passed this Act it did two things: It set apart and reserved the land affected from sale, and it gave to the Metlakahtlans a right to hold and use these lands as tenants in common until otherwise provided by law. The language of the Act is "To be held and used by them in common"; that is to say: it created a reservation of public lands and granted to the Metlakahtlans an estate at will in these lands to be held by them as tenants in common. There is no reason why a rule applicable in interpreting and defining a description of lands contained in a grant conveying an estate in fee, should not be applicable in interpreting and defining a description of lands when contained in a

grant of an estate less than an estate in fee such as an estate at will.

The objection made by the learned trial Judge that the Government and the Metlakahtlans were not "Equals dealing at arm's length," presents no reason why the rule should not be applied in this case. The estate granted was a voluntary gift on the part of the Government. The Metlakahtlans parted with nothing. Surely it cannot be said that the courts should apply rules of construction especially designed to prevent the recipient of a gift from being over-reached by the donor. It is a familiar rule that all instruments relating to gifts, with the single exception of wills, are to be strictly construed in favor of the donor and against the donee; and this rule is especially applicable where the Government is the donor, for all instruments to which the Government is a party are on that account also to be strictly construed in favor of the Government. This then presents two additional reasons why this legislative grant of an estate at will should be strictly construed; one is that it relates to a voluntary gift and the other is that the Government is a party to it.

However, whether this Act be strictly construed or liberally construed is immaterial as far as the issues in this case are concerned. By its express terms its operation and effect is limited to "the body of lands known as Annette Island." No mention is made of the surrounding waters, nor are the fisheries in any

manner referred to. No rule of construction however liberal would enable the Courts to read into an act of Congress things to which not even the slightest reference is made. The most liberal effect that could be given to the Act would be to hold that the lands set apart to be held by the Metlakahtlans in common extended to low water mark instead of high water mark. This, however, would not affect appellant's rights as its fish trap is situated wholly in deep water 200 feet to the seaward of the line of extreme low tide.

There is, however, a further reason why this Act cannot be given the construction contended for. It is found in the fact that Congress did not have the power to thus destroy the public right of fishery in the navigable waters of the United States. Nor could it make a grant of the submerged lands or navigable waters surrounding Annette Island that would have that effect. And this would be true of an estate at will, for years, for life, or in fee.

Appellant's fish trap is situate in an arm of the sea many miles in width. The entire trap is situate in deep water, its shoremost point being 200 feet to the seaward of the line of extreme low tide.

A discussion relating to the power of Congress to exclude the people at large from the navigable waters surrounding Annette Island and prevent them from exercising their common right of fishery therein, in order to give the Metlakahtlans the exclusive right to fish in these waters, involves an inquiry into the title

by which the Government holds the navigable waters and into the question of what right or title the Government has, if any, to the fish found therein.

At common law the title to navigable tide waters vested in the King by virtue of his sovereignty. But the right to fish therein belonged to the people of England who had therein a common of piscary. In ancient times the Norman kings, commencing with William the Conqueror, claimed and exercised the right of fencing or otherwise delineating the boundaries of portions of the navigable waters with a view of excluding the public therefrom and giving to some individual or class of individuals the exclusive right to fish therein. But the creation of these exclusive fisheries was deemed a usurpation by the people of England and an invasion of their common right of fishery. Accordingly a provision was inserted in Magna Charta under which the creation of private fisheries was in the future forbidden and in accordance with which King John agreed to annul and lay open all fisheries from which the public had been excluded by him. While the exclusive fisheries created prior to the reign of King John were left unmolested, it was provided that the fisheries not fenced in or shut against the common use in the time of King John should be from thenceforth laid open. And it was similarly provided in the subsequent charter of King Henry III. Since Magna Charta no private or exclusive fisheries have been or could be created in

the realm of England. From that time on it has been held that the King held the navigable waters by virtue of his sovereignty, but that the right to fish therein was a right common to all the people of England. The law upon this question was carefully and ably reviewed by the Supreme Court of New Jersey in the leading case of *Arnold* v. *Mundy,* 6 N. J. Law, 1, where it was said on page 73 of the opinion:

> "An exclusive right of fishing in a navigable river, is said to be a royal franchise, that is, a privilege or branch of the royal prerogative, granted by the king to a private person. This royal prerogative, we are told, was first claimed by the crown, upon the coming in of William the Conqueror, and was considered by the people to be a usurpation of their ancient common rights. Accordingly, in Magna Charta, which is said to be nothing more than a restoration of the ancient common law, we find this usurpation broken down and prohibited in future. That charter, as passed in the time of King John, enacts, 'that where the banks of rivers had first been defended in his time (that is, when they had first been fenced in, and shut against the common use, in his time), they should be from thenceforth laid open.' And, by the charter of Henry III, which is but an amplification and confirmation of the former, it is enacted, 'that no banks shall be defended (that is, shut against the common use) from henceforth, but such as were in defense in the time of King Henry our grandfather, by the same places and the same bounds as they were wont to be in his time.' By this charter it has been understood, and the words fairly import, that all grants of rivers,

and rights of fishery in rivers or arms of the sea, made by the kings of England before the time of Henry II, were established and confirmed, but that the right of the crown to make such royal grants, and by that means to appropriate to individuals what before was the common right of all, and the means of livelihood for all, for all future time, was wholly taken away. And whatever diversity there may be found in the books, with respect to the different kinds of fishery, it can no way affect the operation of the charter in this respect, because that forbids all manner of fencing in, or shutting, fisheries against the common use. All claim, therefore, of an exclusive right of fishery in a navigable river, founded upon the king's grant or prescription, which presupposes a grant, must reach as far back as Henry II."

With reference to the character of the King's title to the navigable waters, the Court say on page 71:

"Every thing susceptible of property is considered as belonging to the nation that possesses the country, and as forming the entire mass of its wealth. But the nation does not possess all those things in the same manner. By very far the greater part of them are divided among the individuals of the nation, and become private property. Those things not divided among the individuals still belong to the nation, and are called public property. Of these, again, some are reserved for the necessities of the state, and are used for the public benefit, and those are called 'the domain of the crown or of the republic'; others remain common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use, and are called common property. Of this latter kind,

according to the writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish, and the wild beasts. Vattel, lib. i, 20; 2 Black, Com., 14. But inasmuch as the things which constitute this common property are things in which a sort of transient usufructuary possession, only, can be had; and inasmuch as the title to them and to the soil by which they are supported, and to which they are appurtenant, cannot well, according to the common law notion of title, be vested in all the people; therefore, the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit. But still, though this title, strictly speaking, is in the sovereign, yet the use is common to all the people."

And again on page 76 it is said:

"Upon the whole, therefore, I am of opinion, as I was at the trial, that by the law of nature, which is the only true foundation of all the social rights; that by the civil law, which formerly governed almost the whole civilized world, and which is still the foundation of the polity of almost every nation in Europe; that by the common law of England, of which our ancestors boasted, and to which it were well if we ourselves paid a more sacred regard; I say I am of opinion, that by all these, the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products (a few things excepted) are common to all the citizens, and that each has a right to use them according to his necessities, subject only to the laws which

regulate that use; that the property, indeed, strictly speaking, is vested in the sovereign, but it is vested in him not for his own use, but for the use of the citizen, that is, *for his direct and immediate enjoyment.*

"I am of opinion, that this great principle of the common law was, in ancient times, in England gradually encroached upon and broken down; that the powerful barons, in some instances, appropriated to themselves these common rights; that the kings themselves, also, in some instances during the same period, granted them out to their courtiers and favorites; and that these seizures and these royal favors are the ground of all the several fisheries in England, now claimed either by prescription or by grant; that the great charter, as it is commonly called, which was nothing but a restoration of common right, though it did not annul, but confirmed, what had been thus tortiously done, yet restored again the principles of the common law, in this as well as in many other respects; and since that time no king of England has had the power of granting away these common rights, and thereby despoiling the subject of the enjoyment of them."

The Court further held that upon the Revolution the title theretofore held by the King became vested in the State, and that the State through its Legislature might lawfully provide for the erection of wharves, docks and other aids to navigation and might also provide for the clearing and improvement of fishing places in order to increase the product of the fisheries, but with reference to this power of the State it is said: "But still this power, which may be thus exercised

" by the sovereignty of the State, is nothing more than " what is called the *jus regium,* the right of regulat- " ing, improving, and securing for the common benefit " of every individual citizen."

Not only has the case of *Arnold* v. *Mundy* become a leading case in this country, but it has been at least twice referred to by the Supreme Court of the United States in the highest terms of approval. In the case of *Martin* v. *Wadell,* 16 Peters, 345, Chief Justice Taney, speaking for the Supreme Court of the United States, lends approval to the conclusions arrived at by the Supreme Court of New Jersey, and while an express decision upon the points involved in *Arnold* v. *Mundy* was not necessary in that case, the Chief Justice in referring to the opinion of the Supreme Court of New Jersey said that it was entitled to great weight, and that if the words of the Letters Patent under consideration in *Martin* v. *Wadell* had been more doubtful so as to require the application of the law laid down in *Arnold* v. *Mundy* to the decision, the Chief Justice says: "this decision, made " upon such a question, with great deliberation and " research, ought, in our judgment, to be regarded as " conclusive."

Again in the case of *Illinois Central Railroad Company* v. *Illinois,* 146 U. S., 387, Mr. Justice Field refers approvingly to the statement of Chief Justice Taney that the decision in *Arnold* v. *Mundy* was entitled to great weight and was made with great

deliberation and research. And after observing that it was there held that the power exercised by the State of the lands and waters was nothing more than what was called the *Jus Regium,* the right of regulating, improving and securing them for the benefit of every individual citizen, he quotes other portions of the opinion in support of matters then under discussion.

In the case of the *Illinois Central Railway Company* v. *Illinois* one of the questions before the Court related to the validity of a grant made by the State to the railroad company of the submerged lands lying in front of the Chicago harbor. The Supreme Court adopted the conclusions reached by the New Jersey Court in the case of *Arnold* v. *Mundy* and held that the State of Illinois held the title to the navigable waters and the underlying submerged lands by virtue of its sovereignty, but that this was not an absolute title such as that by which the United States holds the public land intended for preemption and sale, but that the State held this title in trust, merely, for the use of the whole people who had in such waters the common right of fishery and that of navigation, and that the State could not substantially impair these rights, but was required by virtue of this trusteeship to so hold these waters and their underlying beds as to preserve to the whole people these public rights. It was held that the State might, as was also held by this Court in the case of *Mission*

Rock Co. v. *United States,* 109 F., 763, authorize the construction of wharves and piers in aid of navigation or dry docks and other like structures and make grants of small parcels of the submerged lands therefor, provided, that such grants did not substantially impair the rights of the public.

If the State were therefore to reserve or set aside its navigable waters for the use of a particular class such as the Metlakahtlans and exclude the public therefrom, its conduct in this regard would not be consistent with the exercise of that trust, which, as was said by the Supreme Court in *Illinois Central Railroad Company* v. *Illinois,* "requires the government of the State to preserve such waters for the use of the public."

This same doctrine was also declared by the Supreme Court of Wisconsin in the case of *Penaukee* v. *Savoy,* 74 Am. St. Rep., 859. It was there held that it was the duty of the State to preserve forever the common rights of navigation and fishery, and that the trusteeship of the State in connection with its title to the navigable waters was inviolable. The Court say:

> "It is the settled law that submerged lands of lakes within the boundaries of the State belong to the State in trust for public use, substantially the same as submerged lands under navigable waters at common law. Upon the admission of the State into the Union the title to such lands, by operation of law, vested in it *in trust to preserve to the people of the State forever* the common rights of

> fishery and navigation and such other rights as are incident to public waters at common law, which *trusteeship is inviolable, the State being powerless to change the situation* by in *any way* abdicating its trust."

If then the State cannot "substantially impair" the public right of fishery and navigation and is bound to preserve the public waters so that the people may be able to exercise these rights forever, it necessarily follows that the State could not set aside and reserve the navigable waters for the use of the Metlakahtlans and forbid the people to exercise therein their common right of fishery. By so doing the State would not only "substantially impair" but it would destroy and do away with that right altogether. It is not and cannot be material whether the public right of fishery is "substantially impaired" by granting the navigable waters or their bed to a railroad company, as had been done in the case of *Illinois Central Railroad Co.* v. *Illinois,* or by setting aside the navigable waters for the Metlakahtlans and excluding the public therefrom. The mischief does not lie in "substantially impairing" the public right of fishery in this or that manner, but the mischief lies in "substantially impairing" that right at all. The object of the law is not to protect the title of the State to the navigable waters but to protect the common rights of the people therein. If these public rights are invaded or "substantially impaired" the mischief is accomplished, and it is immaterial what means are employed to

bring this about. The obligation imposed upon the State as trustee would not be satisfied if the State were to hold the title to the navigable waters for the use of the Metlakahtlans for, in the language of the Supreme Court of the United States, the trust "requires the Government of the State to preserve such waters for the use of the public" and, in the language of the Supreme Court of Wisconsin, the title is vested in the State in trust "to preserve to the people of the State forever the common rights of fishery and navigation." The trusteeship is inviolable. The State cannot substitute one beneficiary for another. The people, that is to say the public, are the beneficiaries of the trust and it is the duty of the State to so discharge its duties as trustee that they—the public—can at all times and forever exercise their common rights of fishery and of navigation.

So also in the Territories, where the title to the navigable waters and their beds is held by the Federal Government in trust for the future State, the right of the whole people to exercise in such waters the common rights of fishery and of navigation exists as fully as it does in the States. These rights of the public are not affected by the question of whether the sovereignty vests in the State or in the General Government. They spring from and find their origin in the common law and exist regardless of whether the title is held by one sovereign or another. In either case the holding of the title is a governmental func-

tion, it is held by the sovereign not as a holder of private lands, but as a sovereign in trust for the whole people who have therein the common rights of fishery and of navigation.

In the case of *Shively* v. *Bowlby,* 152 U. S., 1, the extent of the power of Congress in relation to the navigable waters as well as the existence of the public right of fishery and navigation therein was authoritatively settled by the Supreme Court. In this case it was said: "Notwithstanding the dicta contained in "some of the opinions of this Court, already quoted, "to the effect that Congress has no power to grant "any land below high water mark of navigable "waters in a territory of the United States, it is evi- "dent that this is not strictly true"; and the Court after laying down the rule that in the Territories Congress exercises all the powers of government both Federal and State, proceed to enumerate the exceptions to the rule that Congress cannot make grants of lands below high water mark in the Territories in the following language: "We cannot doubt, there- "fore, that Congress has the power to make grants "of lands below high water mark of navigable waters "in any territory of the United States, whenever it "becomes necessary to do so in order to perform in- "ternational obligations, or to effect the improve- "ment of such lands for the promotion and conven- "ience of commerce with foreign nations, and among "the several States, or to carry out other public pur-

" poses appropriate to the object for which the United " States hold the territory."

Clearly a grant of the navigable waters surrounding Annette Island or a grant of an estate therein to the Metlakahtlans would not come within any of the exceptions here enumerated:

The first exception relates to those cases where it becomes necessary to grant submerged lands in order to carry out international obligations; as when grants to such lands were made by a foreign sovereign having a right under the laws of such foreign sovereignty to make such grants, prior to the acquisition of the Territory by the United States. In relation to a grant of this character made by Mexico prior to the treaty of cession the Supreme Court say: "That doctrine" (referring to the doctrine that the submerged lands are held in trust for the future State), "cannot apply to such lands as had been previously granted to other parties by the former Government": *Knight* v. *Association,* 12 Sup. Ct. Rep., 258. So also fishery rights granted by the King of Hawaii, under laws permitting such grants, were recognized and protected after the cession of the Territory to the United States. But no question of this character can of course arise in connection with our dealings with the Metlakahtlans, whose rights, if any they have, were initiated long after Alaska became American territory.

The second exception arises out of the constitutional right of Congress to regulate commerce. This right

exists, of course, both before and after the admission of the State. But this matter does not enter into our dealings with the Metlakahtlans.

The third exception relates to those cases in which it becomes necessary to grant submerged lands in order to "carry out other public purposes appropriate to the objects for which the United States hold the territory." In order to determine the scope of this exception it becomes necessary to inquire what the objects are for which the United States hold the territory. This inquiry is fully answered by the Supreme Court. After making the statement that the reasons why Congress never disposed of these lands under general laws are not far to seek, the Court proceeds to point out those reasons. The authorities, both English and American, are reviewed to show that the people have a common right of fishery and navigation in the navigable waters. The Court then proceeds to point out that in the Territories the Government holds the title burdened with a still further trust, in that the title is also held in trust for the future State. After so reviewing the law the Supreme Court say:

> "And the territories acquired from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States upon an equal footing in all respects; and the title and dominion of the tide waters, and the lands under them, *are held by the*

United States for the benefit of the whole people, and, as this Court has often said, in the cases above cited, "in trust for the future States."

The objects, therefor, for which the United States hold the title to the navigable waters in the Territories are to insure to the whole people the rights of fishery and navigation in such waters, and to insure the transmission of the title so held to the future State when created. The rights of the people to a common right of fishery and of navigation are not affected by the question of whether the title vests in the General Government or in a State. These rights exist in either case. The only difference being that in the case of the General Government the title is burdened with an additional trust, requiring it to transmit the title, held by it as a sovereign to be transmitted to the future State, as soon as the future State acquires capacity to receive and hold it as a sovereign.

In the case of the *Illinois Cent. R. Co.* v. *Illinois,* it was held that the only grants of submerged lands that were appropriated to the objects for which the title was held by the State of Illinois, which objects were said to be to secure the public rights of fishery and navigation, were grants of such small areas as might serve for foundations of wharves, docks and other structures that would serve as aids to navigation; and in this connection it was further held that the public rights of fishery and navigation could not be "substantially impaired." The title and right of the

General Government, and of the State of Illinois being in this regard the same Congress could make no grant that the State of Illinois could not make except as has been pointed out to carry out international obligations. It follows that Congress could make no grant to the Metlakahtlans of an estate either in fee, for life, for years or at will in the waters surrounding Annette Island, for such a grant would not only "substantially impair," but entirely destroy the public right of fishery therein. And as was said when the case of *Ill. Cent. R. Co.* v. *Ill.* was considered, if a grant cannot be made because it "substantially impairs" the public right of fishery, it follows that a reservation which has precisely the same effect cannot be made.

The mischief does not lie in the making of the grant, but in the effect thereof, that is to say: The impairment of the public rights. What is true of the grant in this respect is true of the reservation. In either case the grant or the reservation do no more than to serve as the means by which the forbidden mischief is accomplished. Indeed, if Congress intended to reserve for the exclusive use of the Metlakahtlans as a private fishery the waters surrounding Annette Island, the very object of the reservation was the destruction of the public right. The underlying reason why Congress can neither grant nor reserve a fishery to or for the Metlakahtlans, or any other individual or class, is found in the fact that the fishery

effected by the grant or reservation does not belong to the Government, but to the people in common.

The precise question of whether Congress could grant or set aside the bed of a navigable stream in a Territory as part of an Indian reservation was passed upon in the recent case of *United States* v. Mackey, 214 Fed., 146. In that case it was contended by the Government that the ownership of the bed of the Arkansas River passed to the Creek nation by a General Grant of lands made to it in the patent executed by the Government to the Creek nation, while Oklahoma was a Territory, conveying to that nation all the tribal lands, which the Creeks have since occupied in what is now Eastern Oklahoma, the Arkansas River having been included within the boundaries of the grant. But Judge Campbell held that the Court would take judicial notice of the fact that the Arkansas River was a navigable stream and that being such Congress had no power to grant it to the Creek nation as part of a grant of lands made to furnish the Creeks with a home in the then far west. It was held that this grant did not come within any of the exceptions pointed out in *Shively* v. *Bowlby* to the general rule that Congress had no power to grant submerged lands underlying navigable waters in the Territories. The objects of this grant were thus stated by the Court:

> "It is familiar history that the purpose of this grant to the Creeks was to provide them a country

> west of the Mississippi to be taken and occupied by them in lieu of the lands formerly occupied by them, which they could no longer occupy in peace because of the encroachments of white settlers, and the friction incident thereto. It was to provide a home for this tribe in the then far west."

Judge Campbell then holds that a grant of the bed of the Arkansas River for this purpose, was not performing an international obligation and was not to affect the improvement of such lands for the promotion or convenience of commerce, and was not to carry out any other public purpose appropriate to the objects for which the United States held the Territory.

This case and the case at bar are identical in principle. In this case the reservation was created to furnish a home for the Creeks; in the case at bar a reservation was created to furnish a home for the Metlakahtlans. In this case the reservation was created by grant; in the case at bar by reserving and setting aside the lands embraced within the reservation. But as has already been pointed out one method of creating the reservation, when applied to navigable waters, is as effective as the other in destroying the public right of fishery in such waters.

The case was reversed on appeal on the ground that the Court erred in taking judicial notice of the fact that the Arkansas River was navigable at the point in question. The Circuit Court of Appeals, therefore, approved of the law as laid down by Judge Campbell

with reference to the inability of Congress to convey navigable waters for the purpose of an Indian reservation. Had the Circuit Court of Appeals not taken the same view of this matter that Judge Campbell did the case would not have been reversed on the ground that the Court erred in taking judicial knowledge of the fact that the Arkansas was navigable, for that fact would have been immaterial, but on the ground that the bed of the river passed as a part of the grant without reference to its navigability.

See also in the case of *Illinois Steel Co.* v. *Bilot,* 83 Am. St. Rep., 909. The Supreme Court of Wisconsin say:

> "The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, up to the line of ordinary high water mark, within the boundaries of the State, because vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds and rivers, to the same extent that the public are entitled to enjoy tidal water at the common law. *A patent from the United States, so far as it purports to convey any of such lands, whether made before the State was admitted into the Union or thereafter, is ineffectual."*

While the rule thus stated is, of course, subject to the exceptions noted in *Shively* v. *Bowlby,* and *Ill. Cent. R. Co.* v. *Illinois,* the opinion points out with clearness the reason for the general rule. In this

regard the opinion is in harmony with the opinions expressed by the Supreme Court in the cases mentioned.

In view of the fact that the Supreme Court has passed upon the matter under consideration, it can serve no useful purpose to further review the decision of the State Courts. It is established law, according to the opinion in *Illinois Cent. R. Co.* v. *Illinois* that the people have in the navigable waters a common right of fishery and navigation which cannot be "substantially impaired" and that it is the duty of the State to preserve these rights for the enjoyment of the people. And it is established by the decision in *Shively* v. *Bowlby* that the people have the same rights in this regard in the Territories that they have in the States. Nor could it be otherwise. These public rights spring from the common law and accordingly as soon as the territory is brought subject to the common law whether by treaty of cession or otherwise these rights arise. And since Congress cannot create a reservation of navigable waters with a view of giving the Metlakahtlans an exclusive right to fish therein without destroying the public right of fishery in such waters, it follows that Congress has not the power to create such a reservation.

II. PROCLAMATION OF THE PRESIDENT.

The proclamation reads as follows:

"Whereas, it is provided by Section fifteen, of the Act of Congress, approved March third, eight-

een hundred and ninety-one, entitled, 'An Act to Repeal Timber-Culture Laws, and For Other Purposes,' that 'Until otherwise provided by law, the body of lands known as Annette Island, situated in the Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's Entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtlan Indians, and those people known as the Metlakahtlans, who have recently emigrated from British Columbia, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior'; and

"Whereas, the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and

"Whereas, it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery;

"Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power in me vested by the laws of the United States of America, do hereby make known and proclaim that the waters within three thousand feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island, and the adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of the said islands, rocks and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join

them in residence on these islands, to be used by them under the fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

"Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned.

"In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done at the City of Washington this 28th day of April, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States the one hundred and fortieth."

In determining the validity and effect of the foregoing proclamtaion it becomes necessary to inquire into its character and purpose.

After reciting the act of Congress setting apart Annette Island for the use of the Metlakahtlans, the preamble makes the statement that the Secretary of the Interior is desirous of placing a cannery in operation on the island and that it is therefore necessary that the fishery in the contiguous waters be reserved for the purpose of supplying fish and other aquatic products for this cannery. The proclamation then proceeds, "Now, therefore" (that is to say for the reasons stated), "I, Woodrow Wilson, etc., do hereby " make known and proclaim that the waters within " three thousand feet from the shore at mean low " tide of Annette Island, etc., are hereby reserved for " the benefit of the Metlakahtlans and such other " Alaska natives as have joined them or may join them

" as residents of these islands, t obe used by them " under the fisheries laws and regulations of the " United States as administered by the Secretary of " Commerce. Warning is hereby expressly given to " all unauthorized persons not to fish in or use any " of the waters herein described or mentioned." The effect of the proclamation then, if valid, is simply to create an exclusive fishery in the waters mentioned for the benefit of the Metlakahtlans. The reason assigned for this action is that it was deemed necessary to create this exclusive fishery in order to supply fish for the Metlakahtla cannery.

While the reason assigned loses all its force in view of the fact that the Metlakahtlan Indians operated this cannery for many years without the enjoyment of an exclusive fishery, and would be operating it now were it not for the indiscreet action on the part of the Board of Education, and in view of the further fact that the cannery itself is no longer in the control of the Metlakahtlans, but has been leased to a white man, it clearly indicates that the object of the proclamation was to create a private fishery, and the further statement in the proclamation that the waters mentioned are reserved for the benefit of the Metlakahtlans, etc., to be used by them under the fisheries laws and regulations of the United States, and the warning given to others not to fish in any of those waters, clearly indicates that the proclamation can have no other effect.

It is contended that the President has no power, by executive proclamation or otherwise, to exclude the public from the navigable tide waters of the United States and prevent the people from exercising therein their common right of fishery, in order that the Metlakahtlans or any other person or class of persons may have an exclusive right to fish therein. If as has been seen, Congress would have no power to take such action it would follow that the President could not do so. But even if it were conceded that Congress had this power, it would not follow that like power was also possessed by the President.

The Constitution provides as follows: "The Con-" gress shall have power to dispose of and make all " needful Rules and Regulations respecting the Ter-" ritory or other property belonging to the United " States." Under this provision Congress has power to exercise in the Territories all the functions of Government both State and Federal (*Shively* v. *Bowlby*). Provided that the power so exercised must be exercised subject to the provisions of the Constitution (*Rasmussen* v. *United States*). But the Constitution places this power in the hands of Congress, so that its exercise becomes a legislative function. Nowhere is similar power conferred upon the President.

Where power is expressly conferred upon Congress it cannot be otherwise than that Congress is the only department of the Government authorized to exer-

cise it. Clearly the framers of the Constitution would not expressly confer power on Congress, if it were their intention that such power should be exercised by Congress not only but by the executive as well. Moreover, the Constitution confers all legislative powers on Congress, making Congress the legislative department of the Government, so that when power is expressly conferred upon Congress, the exercise of such power becomes a legislative function. The exercise of such power is therefore by express action withheld from the executive, who can under the Constitution perform no legislative functions.

While admitting that the Constitution confers no express power on the executive, in this behalf, the learned trial Judge contends that the executive has the implied power to forbid the exercise by the people of their common right of fishery in the navigable waters in order that the Metlakahtlans may have the exclusive right to fish therein. The case of *In re Neagle,* 135 U. S., 64, is relied upon to support this contention. In that case it was held that since the Constitution provided that the executive "shall take care that the laws be faithfully executed" he had power to direct a Deputy United States Marshal to protect Justice Field against threatened bodily injury while Justice Field was engaged in the discharge of his duties. It was held that it was the duty of Justice Field to enforce the laws, and the duty of the executive branch to see that this was done and accordingly

that if Justice Field was threatened with bodily harm while engaged in the performance of this duty it became the duty of the executive to furnish him the necessary protection. It requires no discussion to show that there is nothing in this case that would authorize the executive to create a private fishery for the benefit of a British Columbia tribe of Indians.

"The Government of the United States," says Judge Cooley, "is one of enumerated powers; the National "Constitution being the instrument which specifies "them, and in which authority should be found for "the exercise of any power which the national gov- "ernment assumes to possess" (*Cooley Con. Lim.,* 11). So also it was said by Chief Justice Marshall in *Martin* v. *Hunters Lessees,* 1 Wheat., 564. "The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution." Again the ninth Amendment provides: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." And the tenth Amendment provides: "The powers not delegated to the United States by "the Constitution, nor prohibited by it to the State "are reserved to the States respectively, or to the "people." What is true with reference to powers conferred upon the Government by the Constitution must of course be true of the powers conferred upon each of the departments of the Government by that instrument. If the Government itself has no powers

except such as are conferred by the Constitution, it follows that none of the departments of the Government can have powers unless so conferred.

It is true that the powers granted are not limited to those expressly enumerated but include those that are conferred by necessary implication. No powers pass by implication however except those that are necessary to carry the powers expressly granted into effect. It will scarcely be contended that it is necessary that the President should have the power to create private fisheries in the navigable waters in order to carry into effect any of the powers expressly conferred on the executive by the Constitution.

But even though our Government were not one of enumerated powers, even though the executive possessed all the powers belonging to an executive at common law, and it will not be contended that the executive could possess powers not possessed by the executive at common law unless such additional powers were conferred in unmistakable terms by the Constitution, which is surely not the case with reference to the matter under discussion, the executive would not have the power to create a private fishery in the navigable waters, for the reason that at common law the executive possessed no such power.

As has already been pointed out, in ancient times the King of England exercised this power, but the people of England regarded this as a usurpation and an invasion of their rights. Indeed, they regarded

the common right of fishery as a right so valuable and sacred that its violation was provided against by an express provision in Magna Charta.

Since Magna Charta no exclusive fisheries have been created in England and it is settled law that the King has since that time had no power to create them (*Arnold* v. *Mundy*). In this connection it must be remembered that the inhibition contained in the great Charter is against any interference with the public right, that is to say, the common right of fishery which each individual citizen has a right to enjoy. Any interference, whether by grant, a reservation for the use of Indians, or otherwise, is prohibited. As was said by the Court in *Arnold* v. *Mundy:* "And "whatever diversity there may be found in the books, "with respect to the different kinds of fishery, it can "no way affect the operation of the Charter in this "respect, because that forbids all manner of fencing "in, or shutting, fisheries against the common use."

It is further urged that since it has been held that the President has power to set aside by proclamation portions of the public lands for use as Indian reservations it follows that he had the right to make the proclamation under discussion with a view of setting aside the navigable waters surrounding Annette Island in order to give to Indians the exclusive right to fish therein. In the first place the navigable waters cannot serve the purposes of an Indian reservation, which is a place where the Indians are confined and from

which others are excluded. The Metlakahtlans are not amphibious. The object of the proclamation was not to furnish the Metlakahtlans with a place to live; they had that already. Annette Island was set aside by Congress for that purpose. The object was to deprive the public of their common right of fishery in the waters effected, and to give to the Metlakahtlans the exclusive right to fish therein. Its object was to create a private fishery for the use of an Indian tribe. This is quite a different thing from setting aside a portion of the public lands as an Indian reservation.

The public lands of the United States are the property of the United States. With these the Government can do as it pleases, for in them no one other than the Government has any interest. Anyone going upon the public lands without express authority from the Government becomes a naked trespasser, who may be ejected at will. There may be no special objection to having portions of these lands set aside by the President for this or that public use. Such action may serve a useful purpose and it cannot injure anyone for no one is deprived of any rights that he had before the action was taken.

Not so when the navigable waters are set aside for the exclusive use of some person or class of persons. The navigable waters are not the sole and absolute property of the United States as are the public lands. By virtue of sovereignty the United States hold the title to the navigable waters, but this title is burdened

with a trust in favor of the people. Each individual citizen has in these waters a common right of fishery and navigation, and as was held in the case of *Ill. Cent. R. Co.* v. *Ill.,* it is the duty of the sovereign, holding the title, to preserve these waters so that these rights of the people may be enjoyed. That an executive proclamation which does away with these rights of the public altogether and forbids their enjoyment is not consistent with the trusteeship under which the title is held, is so very evident as to require no discussion. And that such a proclamation differs widely from a proclamation which violates the rights of no one is equally evident. Clearly the right to issue the latter cannot serve as a basis for the right to issue the former. In one case the Government deals with that which is its own—the public lands; in the other it deals with that which is not its own—the right of fishery, which is the common property of each and all citizens alike. This distinction was clearly drawn by the Supreme Court in the case of *Ill. Cent. R. Co.* v. *Ill.,* where in speaking of the title by which the State holds navigable waters it was said, "But it is "a title different in character from that which the "State holds in lands intended for sale. It is differ- "ent from the title which the United States hold in "the public lands which are open to pre-emption "and sale." And again in the same case, with reference to submerged lands, it was said: "The trust "with which they are held therefore is Governmental,

" and cannot be alienated, except in those instances " mentioned, of parcels used in the improvement of " the interests thus held, or when parcels can be dis- " posed of without detriment to the public interests " in the lands and waters remaining. This follows " necessarily from the public character of the property " *being held by the whole people for purposes in* " *which the whole people are interested.*"

And again in quoting with approval the language used by Justice Bradley, in a case where the title by which the State held that the State house and that by which it held navigable waters was compared, it is said:

> "The cases are clearly not parallel. The character of the title or ownership by which the State holds the State house is quite different from that by which it holds the land under the navigable waters in and around its territory. The information rightfully states that prior to the Revolution the shores and lands under water of the navigable streams and waters of the Province of New Jersey belonged to the King of Great Britain, as part of the jura regalia of the crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that after the conquest the said lands were held by the State as they were by the king, in trust for the public use of navigation and fishery, and the erection thereon of whaves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust they were *publici juris;* in other words, *they were held for the use of the people at large.*"

So also in the case of *Arnold* v. *Mundy,* 6 N. J. Law, 1, it was there said by the Supreme Court of New Jersey:

"Nothing can be more clear, therefore, than that part of the property of a nation which has not been divided among the individuals, and which Vattel calls, public property, is divided into two kinds, one destined for the use of the nation in its aggregate national capacity, being a source of the public revenue, to defray the public expense, called the domain of the crown, and the other destined for the common use and immediate enjoyment of every individual citizen, according to his necessity, being the immediate gift of nature to all men, and, therefore, called the common property. The title of both these, for the greater order, and, perhaps, of necessity, is placed in the hands of the sovereign power, but it is placed there for different purposes. The citizen cannot enter upon the domain of the crown and apply it, or any part of it, to his immediate use. He cannot go into the King's forests and fell and carry away the trees, though it is the public property; it is placed in the hands of the King for a different purpose, it is the domain of the crown, a source of revenue; so neither can the King intrude upon the common property, thus understood, and appropriate it to himself, or to the fiscal purposes of the nation, the enjoyment of it is a natural right which cannot be infringed or taken away, unless by arbitrary power; and that, in theory at least, could not exist in a free government, such as England has always claimed to be."

And again with reference to the power exercised by the State in authorizing the construction of aids to navigation and in regulating the fisheries, it is said:

> "But still this power, which may be thus exercised by the sovereignty of the State, is nothing more than what is called the *jus regium,* the right of regulating, improving, and securing for the common benefit of every individual citizen."

Again in the more recent case of *Ill. Cent. R. Co.* v. *Chicago,* 176 U. S., 646, it was said:

> "The State holds the title to the lands covered by the waters of Lake Michigan lying within its boundaries, but it holds the title in trust for the people for the purpose of navigation and fishery. The State has no power to barter and sell the lands as the United States sells its public lands, but the State holds the title in trust in its sovereign capacity and for the people of the entire State."

A discussion of the difference between an executive proclamation setting aside a portion of the public lands as an Indian reservation and an executive proclamation prohibiting the people at large from exercising their common right of fishery in the navigable waters in order that a designated class of Indians may have the exclusive right to fish therein, discloses the reasons that exist, independent of Constitutional objections, why the latter can have no legal effect.

The fisheries in the navigable waters do not belong to the Government but to the people at large: The Government has no interest therein which it can set

aside or reserve for the use of any individual or class of individuals. The Government holds the title, it is true, but it holds this title in trust for the whole people who have in the navigable waters affected the common right of fishery and navigation. Any action on the part of the Government which prevents the whole people from enjoying either the common right of fishery or that of navigation is inconsistent with the exercise of that trust, which, in the language of the Court in *Ill. Cent. R. Co.* v. *Illinois,* "requires the Government of the State to *preserve* such waters for the use of the public." The language of the Supreme Court is clear and explicit, under it the duty of the Government is not fulfilled if it preserves the waters for the Metlakahtlans or for any other special class, but it must preserve them "for the use of the public. Any act of legislation, or executive proclamation, therefor, that has the effect of excluding the public from the use of navigable waters is a clear violation of the trust.

Again, with special reference to the validity of the proclamation as distinguished from an act of Congress upon the subject, the title of the Government is such that in no event can it be the subject of executive action. According to *Arnold* v. *Mundy,* the Government has in the navigable waters only the *jus regium,* the right of regulating, improving and securing them for the benefit of every individual citizen. And this doctrine was restated with approval by the

Supreme Court in *Ill. Cent. R. Co.* v. *Illinois.* The only right that the Government has, therefor, in the fisheries found in navigable waters is the right to regulate them for the common good of the whole people. Such regulation is an exercise of the police power, which requires legislative action and can in no case be the subject of an executive proclamation.

The learned trial Judge also refers to the case of *Russian American Company* v. *United States* as authority for the decision rendered. But in that case the questions now before the Court were not even hinted at. The Packing Company had taken possession of 159.52 acres of land on Afognak Island and had erected buildings thereon. All this was done without authority or license from the United States. Subsequently the whole island was reserved as a fish culture station by an executive proclamation, made pursuant to an express act of Congress. After removing from the island the Packing Company brought suit in the Court of Claims to recover the value of the improvements made by it. The Packing Company was of course a naked trespasser and the Court held that it could not recover. The Court say:

> "But if there were any doubt regarding the rights of the petitioner in connection with the above case, they are completely resolved by the language of Sec. 14 of the act, which declares that the provisions of the preceding sections shall not be so construed as to warrant the sales of any lands belonging to the United States which shall be re-

served for public purposes, or selected by the Commissioner of Fish and Fisheries on the islands of Kadiak and Afognak, for the purposes of establishing a fish-culture station. As the President exercised the rights thus reserved, and declared the whole island appropriated for the purpose of establishing a fish-culture station, and warned all persons to depart therefrom, it is clear that the rights, if any, previously acquired by the settlement, were terminated by the proclamation. Petitioner gained no additional consideration from the improvements put upon the land, since, if for no other reason, these were made prior to the act of 1891, when it was a mere trespasser, and occupying the land without a shadow of title."

It will be seen that in that case no question arose with reference to the right to set aside the navigable waters for any purpose. The improvements made and for the value of which suit was brought were situated upon the land and the land was public land in which no one except the Government had an interest. However, if Congress had set aside a portion of the navigable waters for use in connection with a fish-culture station the question presented would be a very different one from that presented in the case at bar. The maintenance of a fish-culture station would promote the interest of the public fisheries. Such action would not impair the public right but would make it more valuable. But a further discussion of that question would be purely academic as it did not arise in this case.

The only case, so far as can be learned, in which

the validity of an executive proclamation reserving a portion of the navigable waters was ever passed upon is the case of *United States* v. *Ashton,* 170 Fed., 509. In that case President Pierce had set aside an Indian reservation so as to include within its boundaries navigable waters, and it seems that President Grant subsequently extended the reservation with like effect. The case was tried before Judge Hanford, who held that the President cannot by executive proclamation include lands below high water mark within an Indian reservation. In the couse of the opinion Judge Hanford says, on page 512:

> "The Oregon country was acquired by the United States, with the object in view of creating new States to be admitted into the Union upon an equality with the original States, and, until the States now existing within that country were or-organized and admitted into the Union, the National Government held the title to the shores and beds of navigable waters therein, as trustee for the future States. *Pollard* v. *Hagan,* 3 How., 212, 11 L. Ed., 565. If there is any exception to this general rule, it must rest upon a special grant expressly authorized by a law enacted by Congress to provide for some peculiar requirement of the National Government. *Shively* v. *Bowlby,* 152 U. S. 1, 14 Sup. Ct., 548, 38 L. Ed., 331."

And again on page 517 it is said:

> "Any disposition of proprietary rights in the seashore by the Government of the United States, being obnoxious to the firmly established principle that control of the seacoast is an attribute of sov-

ereignty appertaining to the States, could only be valid, if valid at all, by virtue of the exercise of the power vested in Congress to be exercised for the national welfare, and there is no pretext set forth in the bill of complaint or stated in the argument of the complainants' solicitors that any proprietary right to shore lands became vested in the Puyallup Tribe as a community by virtue of any provision, expressed or implied, of any act of Congress whatever. The treaty of 1854 was not in any sense a conveyance of title to any of the lands in controversy to the Puyallup Indians; on the contrary, the treaty was relinquishment by said Indians of whatever rights to these lands may have been theretofore claimed by them. For the reasons already stated, the President could not grant shore lands by the making of an executive order designating the tract of land to be held as a reservation."

There is, however, one further objection to the validity of the proclamation setting aside the waters surrounding Annette Island for the use of the Metlakahtlans.

Congress in order to preserve the Alaska fisheries for the use of our own people passed an act prohibiting aliens from fishing in the waters of Alaska. Section 254 of the Compiled Laws reads as follows:

"That it shall be unlawful for any person not a citizen of the United States, or who has declared his intention to become a citizen of the United States, and is not a bona fide resident therein, or for any company, corporation, or association not organized or authorized to transact business under the laws of the United States or under the laws of any State, Territory or district thereof, or for

any person not a native of Alaska, to catch or kill, or attempt to catch or kill, except with rod, spear, or gaff, any fish of any kind or species whatsoever in any of the waters of Alaska under the jurisdiction of the United States."

Under the provisions of this section aliens are prohibited from fishing in the waters of Alaska, and the Metlakahtlans, being natives of British Columbia, are, of course, aliens (see Act of Congress relating to Annette Island reservation above quoted. See ev. Hanford, Rec., page 171 *et seq.*). An exception is made in favor of the natives of Alaska. But the Metlakahtlans being natives of British Columbia do not come within the exception. While fishing with rod, gaff and spear is not prohibited, the waters surrounding Annette Island are deep waters, not adapted to that kind of fishing (see map of Annette Island, Rec., page 178; evidence Burckhardt, Rec., page 116).

Here then we have a proclamation setting aside a private fishery for the use of a tribe of British Columbia Indians, who cannot make use of the fishery so set aside for them without committing an offense against the United States. And while the proclamation and Act of Congress refer to other natives who may associate themselves with the Metlakahtlans the evidence is that the population is still composed of Metlakahtlans (see affidavit Reagan, Rec., 74).

It will not be contended that the President can by proclamation set aside an Act of Congress; nor will it

be contended that he can in this manner make that lawful which an express act of Congress makes unlawful. This being true a proclamation having this effect is necessarily inoperative. If the object for which the proclamation was issued is such that it cannot be accomplished, it must follow that the proclamation becomes ineffectual. No one would contend that the public should be prevented from exercising their common right of fishery for no purpose whatever. It is undoubtedly true that the attention of the President was not directed to this section, and equally true that the heads of the Bureau of Education having this matter in charge overlooked this section, but this cannot alter the situation. The Act of Congress was on the statute books and it must be given effect in determining the validity of the proclamation.

III. VESTED RIGHTS.

Should it be conceded, however, that the President could by executive proclamation create a private fishery for the benefit of the Metlakahtlans, it does not follow that the Alaska Pacific Fisheries should be enjoined from maintaining their fish trap driven and constructed in the navigable waters of the United States within the area set apart as a private fishery, prior to the time that the President's proclamation was issued.

The record shows that the officers and agents of the Alaska Pacific Fisheries made observations in the

Spring of 1915 with a view of ascertaining the course followed by the incoming schools of salmon, in order to determine whether the present site of the appellant's fish trap would be valuable for the location of such a trap. These observations covered a considerable period of time and in the month of August, 1915, it having been determined that the site would be a favorable one for a fish trap, a diver was employed with a view of examining the bed of the ocean at that point so as to determine the further question of whether it would be feasible and practical to drive a trap there (see evidence, Burckhardt, Rec., page 86). After so determining that the bed of the ocean was such that a trap could there be driven, arrangements were made to procure the necessary piles and the cannery at Chomly was enlarged by constructing new buildings and adding new machinery, so as to be able to can the increased supply of fresh salmon that would come from this trap. In so increasing the capacity of the cannery eighteen thousand five hundred ($18,500.00) dollars were expended (see evidence, Burckhardt, Rec., page 114). The Chinese contracts were made to put up this additional pack at the Chomly cannery and the tin and other supplies necessary in that connection were purchased, so that a failure to operate the trap would result in a loss to appellant of fifty thousand ($50,000.00) dollars in a single year. All this was done in the Fall of

1915 and the Winter of 1915-16 (see evidence, Burckhardt, Rec., page 89 *et seq.*).

Along about the middle of March, 1916, the President of the appellant company carried on a correspondence with the Assistant Secretary of the Interior in relation to the leasing of the Metlakahtla cannery to Mr. Harris, and his representative in Washington was then informed that because of the opposition of Secretary Redfield no special fishing privileges would be granted to the lessee of the Metlakahtla cannery—that the waters were to be left open and that no one was to receive any special fishing privileges (see evidence, Burckhardt, Rec., pp. 118-119).

After being so informed and as soon as the weather was suitable preparations were made to drive the trap and on the 7th day of April the work in this connection was actually commenced with the result that on the 18th day of April, the driving of the trap was completed (see evidence, Burckhardt, Rec., p. —; affidavit of Jenkins, Rec., p. 152; also affidavit of Copeland, Rec., p. 153, and 2nd Finding of the Court, Rec., p. 188). The trap was completed at the expense of approximately four thousand ($4,000.00) dollars.

There is some dispute in the evidence upon the question of whether the webbing was hung at that time, or whether the hanging of the webbing was delayed until the fishing season commenced, but this is quite immaterial, as the hanging of the webbing is a mere incident to putting the trap in fishing con-

dition. After the trap was driven and completed on the said 18th day of April, the proclamation of the President was issued. The proclamation is dated April 28, 1916.

The record shows and the Court found that the trap of the appellant is an ordinary fishing device such as is ordinarily and usually employed in catching salmon in the waters of Southeastern Alaska by those engaged in the fishing business (see evidence, Burckhardt, Rec., pp. 99-100, and 2nd Finding of the Court, Rec., p. 188).

It is contended on the part of the appellant that since it constructed its fish trap in connection with the exercise of its common right of fishery, the fish trap being an ordinary and usual device employed in that connection which it had a right at common law to employ, and the use of which was recognized and sanctioned by the acts of Congress, it acted lawfully and within its rights, and having expended its money and its labor in constructing a structure which it had a legal right to construct, it acquired a vested property right in the structure so constructed of which it could not be deprived by subsequent legislation or executive proclamation.

That the appellant had a common right of fishery in the navigable waters of the United States where the trap is now situate, prior to and at the time its fish trap was constructed cannot be denied. And since it had this right it follows that it had the right to

employ, use and install any suitable device necessary to the enjoyment of the right. The Legislature having the right to regulate the exercise of the rights of fishery and navigation may pass regulatory measures forbidding the use of such devices as in its judgment are destructive of the common right, either of navigation or fishery, or it may prescribe the manner in which this or that device may be used with the view of promoting the common rights of navigation and fishery, but in the absence of any legislation upon the subject any device whatever may be employed, at least so long as navigation is not obstructed.

This matter was before the Supreme Court of the State of Michigan in the case of *Lincoln* v. *Davis,* 53 Mich., 375; 51 Am. Rep., 116. In that case the plaintiff, who was a fisherman, had, in the language of the opinion "caused stakes to be driven in Thunder "Bay commencing about a mile east of Sulphur "Island and thence continued eastward for a distance "of about 160 rods for the purpose of affixing thereto "trap nets for fishing." It will be observed that the appliance there used was in all respects similar to the fish trap of the appellant. The defendant in the case under discussion had taken up and removed these stakes. The plaintiff brought trespass and recovered. On appeal the judgment was affirmed. In the course of an opinion by Judge Campbell, concurred in by Judge Cooley, it is said:

"Outside of the statutory line I think there can

be no doubt of the right of any one to fish with such appliances as are appropriate to open-water fishing. It has always been customary on these lakes to treat deep-water fishing and navigation as resting on the same basis, except in narrow waters or near shore, where fixed apparatus might have some relation to riparian occupancy as used in connection with it. Fishing such as was involved in this controversy has no natural connection with the dry land or its approaches. It is carried on altogether by the aid of vessel or boat navigation, and is fairly incidental to that class of business."

But appellant's right to use a fish trap as an appliance in connection with the exercise of its right of fishery does not in Alaska depend upon its common law right to do so. The right to employ fish traps for this purpose was recognized, sanctioned and regulated by an express act of Congress. Sections 261 and 262, Chapter 3 of the Compiled Laws of Alaska are as follows:

"Sec. 261. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel, or fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than five hundred feet, or within five hundred yards of the mouth of any red-salmon stream where the same is less than five hundred feet in width, with the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce and Labor is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed.

"Sec. 262. It shall be unlawful to lay or set any drift net, seine, set net, pound net, trap, or any other fishing appliance for any purpose except for purposes of fish culture, across or above the tide waters of any creek, stream, river, estuary, or lagoon, for a distance greater than one-third the width of such creek, stream, river, estuary, or lagoon, or within one hundred yards outside of the mouth of any red-salmon stream where the same is less than five hundred feet in width. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance."

The appellant then having constructed a fish trap not only in accordance with and in the exercise of its common law right of fishery, but under and pursuant to and in accordance with an express act of Congress upon this subject, expended money and labor in the acquisition of property while in the exercise of a lawful right.

Not only has one who acquires property in a lawful manner and while in the exercise of a lawful right a vested right in such property in accordance with the general principles of law and the dictates of sound reason, but where one expends labor and money in the erection of fixed fishing appliances in the navigable waters, or has otherwise fitted a place in such waters for profitable fishing, such a one is entitled to pro-

tection in the enjoyment of the thing upon which such labor and money have been expended, as long as he continues in possession and occupation.

Farnham on Waters, Sec. 394;
Lewis v. *City of Portland,* 35 Pac., 256;
Pitkin v. *Olmstead,* 1 Root, 217 (Conn);
Lay v. *King,* 5 Day, 72;
Gallup v. *Tracy,* 25 Conn. Rep., 10;
Post v. *Kreischer,* 8 N. E., 365.

In *Farnham on Waters,* page 394, it is said:

> "Every individual has the right to enjoy the public right and since no two individuals can enjoy precisely the same right at the same time, some rule must be observed as to the order in time in which the rights shall be exercised. In some instances this is regulated by custom. No person can acquire a right of fishing in a public fishery superior to any other, unless he has gone into the common waters and set up and established his pounds and stakes and taken possession of the line which those pounds and stakes included, with which a stranger can not directly interfere. . . . When labor is necessary to fit a certain place for profitable fishing, the one bestowing that labor is entitled to protection in this enjoyment as long as he continues in possession and occupation."

In the case of *Pitkin* v. *Olmstead,* 1 Root, 217, it was held that where one in the exercise of his common right of fishery cleared a portion of the bed of a navigable river, he had a right to occupy and use the portion so cleared and improved by him during

the fishing season. Upon that question the Supreme Court of Connecticut say:

> "The river being a public navigable river, it is for all the citizens to navigate their vessels in and to draw seines for the purpose of taking fish—that the bed of the river is the private property of no one but remains as public as the waters that flow in it—whoever therefore by labor and expense clears a fish place in its bed acquires a right to occupy and enjoy it in preference to any other and by long continued possession and occupation in the proper sense the right is strengthened and confirmed: and the defendants had no right to disturb or interrupt the plaintiffs in the exercise of their right in their own proper fishing place so long as they did not go upon their land."

And in the opinion in the case of *Lay* v. *King, supra,* it is said:

> "Where a man by labor and expense makes a fishery without obstructing or infringing upon previously existing rights, he ought to be protected in the enjoyment of it."

The case of *Gallup* v. *Tracy* arose under a statute of the State of Connecticut entitled, "An Act for encouraging and regulating fisheries," which permitted every inhabitant to plant oysters in any of the navigable waters of the State, and with the consent of a committee appointed for that purpose by the town in which the same should lie, to mark, stake out and enclose the ground on which such oysters were planted. A party staking out such ground and planting such

oysters was held to have acquired a vested right in the oysters planted and to the occupation of the place where they had been planted of which he could not be deprived by a subsequent repeal of the statute giving the right. In passing upon this question the Court say: "We think the plaintiff had acquired a vested "right in the oysters which he laid down and to the "occupation of the place where he laid them down."

In the case of *Post* v. *Kreischer,* 8 N. E., 365, it was held that under the common law oyster fishermen had in connection with the exercise of the right of fishery a right to plant oysters in the bed of navigable waters and mark out the spot where the oysters were planted, and that upon so doing they acquired a right to the oysters produced within the area marked. This case arose in the State of New York and it will be observed that the Supreme Court of New York holds that a person planting oysters in the navigable waters and marking the area within which the oysters were planted, has the same right at common law that was conferred upon a person taking similar steps by the Connecticut statute considered in the case of *Gallup* v. *Tracy, supra.* In passing upon this question, the Supreme Court of New York say:

> "The authorities sustain the proposition asserted by the plaintiff that by the common law oysters planted in a bed clearly marked out and defined in the tide waters of a bed or arm of the sea, which is a common fishery to all the inhabitants of the State where the bed or arm of the sea is situate,

where there are no oysters growing spontaneously at the time are the property of the person who plants them and the taking of them by another is a trespass for which an action lies.

"The planting of oysters in tide waters and the right of property in the person planting them is not regarded as an exclusive appropriation of the right of fishery common to all the inhabitants of the State, but as a legitimate exercise of the common right not inconsistent with its reasonable enjoyment by others."

In the case of *Lewis* v. *City of Portland, supra,* the same legal proposition presented by the case at bar was before the Supreme Court of Oregon. Under the laws of the State of Oregon riparian owners had the right to construct wharves into the streams by which their land was bounded. A riparian owner in the City of Portland had constructed a wharf in aid of navigation and after the wharf had been constructed, the Legislature passed an act authorizing the City of Portland to construct a bridge across the river at a point and in a manner that would greatly damage the plaintiff's wharf. It was held by the Supreme Court of Oregon that this was an interference with a vested right, and that the wharf built could not be taken without the payment of compensation. In passing upon this, the Supreme Court of Oregon say:

"The statute simply grants permission or license to any upland owner in an incorporated town whose land fronts upon a navigable stream to construct a wharf in front of his land, which per-

mission, when acted upon, renders his wharf a legal structure. Its object is to encourage the building of wharves to aid navigation, and for the benefit of commerce. Within its purport, then, what difference would it make whether the wharf was built before or after the statute was enacted? In either case, the wharf would serve the object it sought to accomplish, and hence be a legal structure within its spirit and intent. But it is argued that the leave granted under the statute, being merely a permission or license, is revocable at the pleasure of the State; and that, as a consequence, the wharf of the plaintiff ceases to be a legal structure, or to have a legal existence, when the leave is withdrawn, or the license revoked. The statute has not been repealed, either directly or by implication, and, so far as it is concerned, there is no revocation of the license granted. The most that has been claimed for the Meussdorffer Act in that connection is that it—being for a public purpose—operates to revoke the license of the plaintiffs, and thereby to deprive their wharf of its legal foundation and existence. It will be observed, then, that the argument is based on the theory that the permission granted by the statute to build a wharf is merely a license, and, as such, may be revoked at the pleasure of the State, after it has been acted upon, and the wharf erected. But this is not so. As was said in *Bowlby* v. *Shively, supra,* the statute does not vest any right until exercised. It is a license revocable at the pleasure of the Legislature until acted upon and availed of. It is doubtless true that, if the statute should be repealed, or the adjacent tide lands disposed of, the privilege given the upland owner to build a wharf across the tide lands into deep water, unless acted upon or availed of, would be revoked. But the riparian owners who have taken

advantage of the permission or privilege to build wharves—especially those on fresh navigable waters, for the reasons suggested—have acquired rights that would not be affected by the repeal of the statute. These wharves are legal structures, and as such are private property, which cannot be taken without due process of law, and due compensation therefor. Hence the contention of the defendants that the Meussdorffer act — which authorizes the location and construction of the Burnside street bridge, and under which they are proceeding to build it—is a revocation of the leave or license, cannot be maintained. Nor do we find anything in the case of *Illinois Cent. R. Co.* v. *Illinois, supra,* in conflict with this result. There the grant of the submerged soil of the lake was in such quantity as, in the opinion of the Court, impaired the public interest in its waters, and operated, if irrepealable, as an abdication by the State of its trust over the property. The right of a riparian owner to build a wharf over the submerged soil of a river to navigable water is not inconsistent with the public interest, nor in prejudice of the public rights. Nor does the grant of such subjacent soil or tide lands subject to the paramount right of navigation and commerce authorize its use for any purpose inconsistent with the public interest. The land in front of the riparian owner, when used for a wharf, and under proper regulation, is in aid of navigation, and for the benefit of commerce. Of course, the State has the right to regulate the building of wharves, or to determine how far rights in submerged soil can be exercised consistently with the easement of navigation. Our State has made such regulations and, as there is no claim that the wharf of the plaintiffs impedes navigation, or is not erected in conformity with its requirements,

it must be regarded as a legal structure, and entitled to be protected as private property. Although the evidence shows that the original wharf was torn down and rebuilt in the year 1876, in conformity with the ordinance, we have not deemed it necessary to refer to that fact as strengthening the right of the plaintiffs in the premises.

"Without further reference, it is sufficient to say that we think the plaintiffs have a right of property in their wharf of which they cannot be deprived except in accordance with established law, and, if it should be necessary that it should be taken or destroyed for the use of the bridge, that it cannot be done without due compensation therefor."

This case is in point not only because the principle involved is the same as that involved in the case at bar, but more especially because the facts to which the principle is applied are of like character. In the case under discussion the right of the riparian owner within an incorporated town to build a wharf to deep water existed under an Oregon statute. In the case at bar the right to build a fish trap exists both at common law and under the statute. Of course the origin of the right, that is to say the question of whether it springs from the common law or from the statute, does not affect or alter it so long as it exists.

In the case under discussion the right to build a wharf existed to facilitate the common right of navigation. In the case at bar the right to construct a fish trap exists to facilitate the exercise of the common right of fishery. In the case under discussion the structure that formed the subject of the controversy,

that is to say the wharf, was a fixed immovable structure consisting of piles driven in the ground in such a way as to support a platform. In the case at bar the structure under consideration is a fixed and immovable structure consisting of piles driven in the ground closely together and in such a manner as to form chambers for the purpose of entrapping fish. In the case under discussion the wharf was constructed while the right to construct it existed. In the case at bar the fish trap was constructed while the right to construct it existed. In the case under discussion the Oregon Legislature passed an act interfering with the maintenance and use of the wharf after it had been constructed. In the case at bar, the President issued a proclamation interfering with the maintenance and use of the fish trap after it had been constructed. In the case under discussion the Supreme Court of Oregon held that in so far as the statute interfered with the maintenance and use of the wharf it was void in that it interfered with vested rights. In the case under discussion it must follow that the President's proclamation is void in so far as it interferes with the maintenance and use of the fish trap in that it interferes with vested rights.

So also in the case of *Middleton* v. *Flat River Booming Company,* 27 Mich., 533. Certain mill owners had erected dams in the Flat River for the purpose of developing power to operate their mills. The Flat River Booming Company was interfering

with the use of these dams in the stream and the development of power in connection with the operation of these mills by placing obstructions in the stream above the dams and impounding the water with a view of suddenly releasing it so as to assist in the floatage of logs. This conduct on the part of the Flat River Booming Company resulted in injury to the owners of the mills. The defense was that the Flat River Booming Company was incorporated under a law that gave it the right to do the things complained of, but the Court held that the right to float logs in a general sense and the right of developing power by means of dams were both public rights of such a character that one should not be exercised to the exclusion of the other, but that in the exercise of one of these rights due regard should be given to the right to exercise the other in order that both might exist together. And that the statute authorizing the Booming Company to do the acts complained of could not impair or interfere with the maintenance of the dams, since the right to maintain these had become vested and could not be devested by subsequent legislation. In passing upon this question Judge Cooley, speaking for the Supreme Court of Michigan, says:

> "Another position of defendants is that being incorporated company and authorized by the act under which they were organized to do the act complained of, they are not liable to such suits

> by private parties. . . . The incorporation act can not be understood as intending to authorize the companies formed to destroy vested rights of property."

In the case of *Glover* v. *Powell,* 10 N. J. Eq. (2 Stockt.) 211, the principle here contended for was applied by the Supreme Court of New Jersey. An act of the New Jersey Legislature empowered the defendants to maintain a dam across the mouth of a small creek, which the Court held was not navigable in fact, with a view of improving adjoining meadows. In the construction and maintenance of this dam the defendants had expended about eight thousand dollars. By a subsequent act of the Legislature enacted after the dam had been constructed, it was provided that this small creek should be considered a public highway and that the dam previously erected should be removed. The Court held that the defendants had a vested right in the dam of which they could not be deprived by a subsequent act of the Legislature. The Chancellor says:

> "The dam and water works in question are private property. They have been constructed, maintained and paid for by the owners of the meadows along the creek. They have been acquired under the express sanction of law."

It will be observed that in the Michigan case, the dam was constructed under a right existing at common law while in the New Jersey case the dam was con-

structed under a statute authorizing its construction. But in either case whatever the source of the right, the parties acted within their lawful rights in constructing the dam, just as the appellant in this case acted within its lawful right in constructing the fish trap. The dams constructed also were fixed and immovable in their character just as is the fish trap constructed by the appellants. The property rights acquired in the cases under discussion were identical in character with the property rights acquired by the appellant. If the property rights acquired by the parties in the cases under discussion were vested rights of which they could not be deprived by subsequent legislation, the property right acquired by the appellant must for the same reason be regarded as a vested right that can not be impaired or destroyed by executive proclamation.

This legal proposition, in connection with those previously discussed, presents a public question of the highest importance. The Alaska fisheries are among the largest in the world. Many millions have been invested in them. They have given employment to thousands of fishermen, including both Indians and white men, to say nothing about the large number of Orientals employed about the canneries, and they have filled the markets of trade with a food product that is at the same time cheap, palatable and nutritious. That this industry should be preserved and protected is not only a matter of great concern to the people of

Alaska who look to it for employment and participate in the profits resulting from it, but also to the many thousands residing elsewhere in the United States who because of the high price of meat look to it for a cheap and wholesome food supply. However important therefore the decision in this case may be to the appellant because of its direct effect upon its property rights, the decision is of far greater importance to the public at large.

Seventy-five per cent. of the fish caught in Southeastern Alaska are caught by means of fish traps. (See evidence Burckhardt record, page 100). These traps consist of piles driven in the ground as closely together as possible and in such a manner as to form chambers into which the fish are led by means of a single row of piles extending out from the trap and called the "lead." Web is hung over the piles so driven in order to prevent the fish from escaping through the spaces that necessarily exist between the piles however close they may be driven. This appliance can of course not be constructed except in comparatively shoal water, so shallow that piles can be found long enough to reach from the surface to the bed into which they must be driven. The trap therefore can only be employed in intercepting and entrapping such fish as happen to pass within a short distance of shore. This has led the owners of the various Alaska fisheries to construct traps here and there at advantageous points along the shores of the

many islands, as well as the mainland of Southeastern Alaska.

The Alaska Indians live in villages which dot the shores of all the larger islands as well as those of the mainland. Many of these villages are very much larger than the village of Metlakahtla where the Metlakahtlans reside. While these Indians belong to different tribes the individuals of one tribe do not differ materially from the individuals belonging to any of the other tribes. All the coast Indians including the Metlakahtlans have the same characteristics. If, therefore, the waters surrounding Annette Island should be set aside for the exclusive use of the Indians residing in the village of Metlakahtla, there is no reason in law or in morals why the waters surrounding the various islands situate in Southeastern Alaska should not be set aside for the exclusive use of the several tribes inhabiting those islands. In fact our government owes a far greater duty to the Indian tribes that inhabited Alaska at the time of its purchase from Russia than it does to the Metlakahtlans who were at that time inhabitants of British Columbia. Yet it is plain to see that if the same action were taken for the benefit of the other Indian tribes that has been taken for the benefit of the Metlakahtlans the white fishermen would lose their employment and means of making a livelihood and the fisheries would be forced to retire from business

with the consequent loss of the capital invested. Nor is this the expression of a groundless fear.

Not only is there every reason why these additional reservations should be created, if the one now under consideration is a valid and proper one, but since the commencement of this suit what are referred to in the newspaper reports from Washington as the "ancient fishing grounds of the Chilcats" were by executive proclamation reserved for the exclusive use of the Chilcat tribe. This reservation is situate on the Chilcat River, a stream that flows into salt water a short distance from appellant's Chilkoot cannery. No one knows to what extent the public fisheries in Alaskan waters will in the future be affected by these executive proclamations, but everything points to the entire destruction of the public right for the benefit of the various Indian tribes.

And even though no new reservations should be created the effect of the existence of the right to create them, if that right should be established, would be almost as disastrous to the fisheries as the actual creation of the additional reservations. For no one would know who would be the last to stand or the first to fall. Cannery supplies must be bought in advance and traps must be driven in advance of the fishing season. If then any cannery man can be prevented by executive proclamation from fishing in the waters in the vicinity of his plant, he cannot, with any assurance, invest his money in supplies, in the driving of traps,

or in the making of other preparations in advance, for this done, he may find as did the appellant in this case that the waters from which he must secure his supply of fish are closed to him before he can use his supplies or employ his traps for the purpose designed.

As late as the month of March in this year, the representatives of the appellant were advised by the officials at Washington that the waters surrounding Annette Island would be open to every one and that no special fishing privileges would be given therein (See evidence Burckhardt, Record, pages 118-119). Upon these assurances appellant's trap was driven, and the trap had only been completed ten days when the executive proclamation was issued forbidding its operation, so that if the proclamation is a valid one the appellant is deprived not only of the money expended in connection with the construction of the trap itself, but is also obliged to bear the loss occasioned by the purchasing of its supplies in advance and the employment of the necessary Oriental labor in advance. Surely no one is warranted in carrying on business on so unstable a basis. If the public can thus by executive proclamation be excluded from portions of the navigable waters, the public right of fishery ceases to be of value. No one can make preparations to enjoy this right for he has no assurance that the right will still exist when his preparations have been made. Every reason that demanded the opening of the navigable waters to the public so

that they might exercise therein their common right of fishery that existed at the time of Magna Charta exists with equal force at the present time and the affirmative sanction given by Congress itself to the exercise of the right by passing numerous statutes in connection with its regulation furnishes an additional reason why the right so sanctioned should not be subject to invasion by executive proclamation.

It must of course be conceded that the President in making the proclamation under discussion was actuated by the highest motives and not by any desire to violate or impair private rights. His sole motive was undoubtedly that of assisting an inferior race and no motive could be more lofty. But the effect of the proclamation on the business and property of the appellant is none the less disastrous. That the President did not intend the proclamation to have this effect and that the money lost was lost in helping along a good cause does not compensate the appellant for the loss sustained.

That in the past the Indian has not been getting much the better of it can not be denied, but this has been due more to the bunglesome manner in which Indian affairs have been handled than to a lack of good intentions. In the States the Indians have been herded on reservations with the natural result that they have almost become extinct. It has long been a known fact that herds of wild animals soon become extinct when confined. The Indian is not a wild

animal but his roving nature and outdoor life have made him such that he thrives under the same conditions that permit wild animals to thrive. And being confined in the reservations the Indians have become extinct for the same reasons that wild animals would become extinct under like circumstances.

In Alaska the Government has at least until very recently never done everything for the Indian except in the single case of the Metlakahtlans, who, as already has been said, were not Alaska Indians. The Indian has been compelled to rely upon his own resources and instead of being confined to a reservation has been permitted to live in and about the white settlements. The effect upon the Indian has not only been salutary but marvelous. His simple mind is most receptive and he responds to even the slightest change in his environment with surprising alacrity. He, like the white man, is the product of his environment, but due to the fact that he has not yet formed the habit of the white man of meeting everything new with an interrogation point, the effect of a change in his environment upon him is more marked and immediate. This is best illustrated by the cases of those Indians who have been sent to Eastern universities. They return home entirely transformed. The change in environment so affects them that they no longer resemble the Indian in appearance, even their skin seems to have whitened because of their new surroundings. Some will tell us that this is because of

the fact that they have been educated and taught new things. Not so. For, place these same Indians back in an Indian camp and in six months they do not differ from other Indians. They have not lost their education, but they have responded to the change in their environment. Education may enlarge and add to the environment. It may select from any environment those things which form the most wholesome subjects for mental activity. To this extent it affects the individual, white or Indian, and no further.

When the white man came to Alaska he changed the environment of the Indian and the Indian has responded to the change so effected with the result that the Indian of to-day is in no sense the Indian of thirty years ago. Then he was a roaming, roving savage. To-day he is in many respects a useful member of society. Unlike the Indians of the States, the Alaska Indians are neither wards nor mendicants, but independent, self-reliant human beings. They are good miners, good fishermen, good carpenters and among them may be found many highly skilled mechanics. That this is the result of the change in environment brought about by the advent of the white man is illustrated by the case of the Metlakahtlans. These Indians received a much earlier start on the road toward civilization than did those further north. When Father Duncan was added to their environment he brought with him all the changes that a single, able, courageous and benevolent man could bring, and

the Indians in that case, as in other cases, responded quickly to this change in their environment. They made remarkable progress, but unfortunately our benevolent Congress reserved for their exclusive use Annette Island. Father Duncan was there but no other white man could come. Their environment had been changed and they had responded to the change, but further changes were prevented and thereby further progress was blocked. If they have made any progress at all in late years it is because they have not been closely confined to Annette Island so that they have been to some extent brought in contact with the conditions that exist in the neighboring white settlements. The net result has been that although the Metlakahtlans received a much earlier start, the Indians residing about Juneau, Douglas, Sitka and other white settlements have surpassed the Metlakahtlans in the race for civilization.

The development of the fisheries and mines of Alaska has been responsible for the changed environment to which the Indian has adapted himself and which has resulted in the amazing progress he has made. But let the public waters be reserved for the use of the Indian so that the fisheries and the white fishermen are compelled to withdraw and the Indian will slink back to savagery to the exact extent that the changes in his environment wrought by the introduction of the fisheries and the white fishermen have been withdrawn, just as surely as the Indian college

graduate loses newly-acquired characteristics upon returning to his native tribe.

However lofty our motives may therefore be and however pure our intentions in creating private fisheries for the use of the Indians, the ultimate effect of our action upon the Indians themselves is bound to be quite the reverse from what we had intended it to be.

RIVERS AND HARBORS ACT.

It is contended on the part of the Government that the construction of appellant's trap was illegal because its construction had not been authorized by the Secretary of War under the provisions of the Rivers and Harbors Act. That act provides:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structure in any port, roadstead, haven, harbor, canal, navigable river or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War";

Appellant's trap is situate in an arm of the North Pacific ocean many miles in width; is built on a rocky reef extending out from the westerly shore of Annette

Island; is equipped with lights and with a bell and the locality within which the trap is situated is not used by ships for the purpose of navigation, the place being out of the line of travel. The trap being situate, however, on a reef and being equipped with lights and a bell would, if the waters were used by ships, serve as an aid to navigation in that it would warn ships off from the rocky reef on which the trap is built. (See evidence Burckhardt, Record, page 97 *et seq.*, also see map, Record, page 179, and Finding No. 2, Record, page 188).

The Court's finding upon this subject is as follows:

> "that the said fish trap so constructed or about to be constructed is a usual and ordinary fishing appliance and as is ordinarily used by those engaged in catching salmon in the waters of Southeastern Alaska; that the portion of said trap nearest to the shore of Annette Island is situate two hundred feet to the seaward from the line of extreme low tide, and that although the said trap is in navigable water of the United States, technically speaking, it is not within any portion of the waters of the United States, which are, or ever have been, used for the purpose of navigation, and is not in, and is not an obstruction to, the navigable capacity of any of the waters of the United States in the sense used in the Rivers and Harbors Act, approved March 30, 1899."

It can not of course be contended that appellant's trap standing as it does on a rocky reef on the shore of the open sea is an obstruction to the navigable capacity of any of the waters of the United States.

But it was contended at the trial on the part of the Government that since the trap was situated in waters of the United States at a point where no harbor lines had been established, it could only be constructed upon plans recommended by the Chief of Engineers and authorized by the Secretary of War. This brings up for discussion the question of what is meant in the Rivers and Harbors Act by the phrase, "or other water of the United States" following the words "in any port, roadstead, haven, harbor, canal, navigable river."

It is a rule of construction that where a statute enumerates specific things and follows such enumeration with a general term, the general term will be held to include only such things as are of like character to those previously enumerated. This rule is of course based upon the principle that courts in construing acts of the Legislature should give each word employed effect if possible. For it is not to be presumed that the Legislature made an idle use of words. So in this case, there must be some reason why Congress used the language, "in any port, roadstead, haven, harbor, canal, navigable river or other water of the United States." If it had been the intention of Congress that the establishment of a breakwater, bulkhead or like structure should be prohibited in any water of the United States except upon plans recommended by the Chief of Engineers and authorized by the Secretary of War, there would have been no occasion for the employment of the words, "port,

roadstead, haven," etc. Congress would simply have said, "in any water of the United States," and would have omitted the enumeration of specific places by which this general term is preceded. All the specific places enumerated are those in which traffic is apt to become congested. It is so with a port, with a roadstead, with a haven, with a harbor, with a canal and with a navigable river. And it is clear when Congress follows these specific terms with the general term, "or other water of the United States," it had in mind other waters of the United States only in which traffic might become congested. There is a reason why harbor lines should be established in places of this character or why structures should in the absence of established harbor lines be in these places constructed in an orderly and systematic manner. Piers, wharves and other structures which would if systematically constructed not interfere with navigation or be aids to navigation, would become nuisances if allowed to project one in front of the other or to be placed haphazard here and there without system or order. But this does not apply to structures built out on the shore of the open sea, and it would lead to ridiculous conclusions to assume that it was the intention of Congress that every one building a wharf, fish trap or other structure whatsoever anywhere along the thousands of miles of coast line of Alaska was to do so only upon plans approved by the Chief of Engineers and authorized by the Secretary of War.

Owing to the precipitous character of the mountains and their abrupt rise from the water's edge, white settlers and Indians alike have at innumerable points along the Alaska coast driven piles and erected thereon structures of every kind and character. The necessities of the situation have compelled the construction and erection of these structures, and while they serve many useful purposes they do not affect navigation one way or the other. Most of them are small; many temporary. In most cases they are erected in out of the way places where surveyors can not be had, and in other cases they are such as not to warrant the expense of employing a surveyor to make a survey and prepare plans even though a surveyor might be in reach. Clearly it was not the intention of Congress to place upon those erecting these structures the useless expense of preparing plans and submitting these to the Chief of Engineers, nor was it the intention of Congress to place upon the Chief of Engineers or the Secretary of War the burden of going over and approving plans for all these innumerable projects.

The rule of statutory construction above referred to is so generally understood that it needs no citation of authorities to support it, but reference will be made to the single case of the *United States* v. *Bevans,* 3 Wheaton, 336. In that case the defendant was indicted for murder committed on the United States battleship Independence, and was tried and convicted in the Federal Courts under an act of Congress which

provided: "That if any person or persons shall "within any fort, arsenal, dockyard, magazine, or any "other place, or district of country, under the sole and "exclusive jurisdiction of the United States, commit "the crime or wilful murder, such person or persons," etc. It was contended that the deck of the United States battleship was a place within the exclusive jurisdiction of the United States and that because of this the Federal Courts had jurisdiction under the act quoted. But Chief Justice Marshall held otherwise and in passing upon the matter said, "the objects "with which the word 'place' is associated are all "in their nature fixed and territorial. A fort, an "arsenal, a dockyard, a magazine are all of this char- "acter. When the sentence proceeds with the words "'or any other place, or district of country, under the "'sole and exclusive jurisdiction of the United States,' "the construction seems irresistible, that by the words "'other place' was intended another place of a similar "character with those previously enumerated and with "that which follows. Congress might have omitted "in its enumeration some similar place within its "exclusive jurisdiction which was not comprehended "by any of the terms employed, to which some other "name might be given; and therefore, the words "'other place,' or, 'district of country,' were added, "but the context shows the mind of the Legislature "to have been fixed on territorial objects of a similar "character."

The intention of the Legislature in this connection is evident not only from the fact that the general term "waters of the United States" is preceded by an enumeration of specific places such as ports and harbors, where traffic is often congested and where order and system is required in the construction of wharves and other structures, but also from a consideration of the other provisions of the act. It is first made unlawful to create any obstruction to the navigable capacity of any of the waters of the United States. This provision is broad and refers to all structures whatsoever in whatsoever place so long as the place is in the navigable waters of the United States. There are, however, structures such as those afterwards enumerated in the act that might be lawfully erected notwithstanding the first provision, including structures that either do not impair the navigable capacity of the waters within which they are erected and such as wharves and piers that serve as aids to navigation. Yet these structures while they might not obstruct the navigable capacity of the waters in which they are situate, they might when placed in ports, harbors, havens, rivers or other like places become a nuisance, unless constructed along orderly and systematic lines, and accordingly provision is made with a view of providing for their construction along such lines. Where harbor lines are established it is provided they shall not extend out beyond such harbor lines and if

harbor lines have not been established, the structure shall be built upon plans approved by the Chief of Engineers and authorized by the Secretary of War.

That the fish trap of appellant is not within a harbor, port, roadstead, haven, navigable river or other like place is evident from a glance at the map and is also testified to by Mr. Burckhardt. And the Court also found as an affirmative fact that "although the "said trap is in navigable waters of the United States "technically speaking, it is not within any portion "of the waters of the United States which are, "or ever have been, used for the purpose of "navigation and is not in, and is not an obstruction "to the navigable capacity of, any of the waters of "the United States in the sense used in the Rivers "and Harbors Act approved March 31, 1899."

This proposition also presents a public question of much importance. A very large per cent. of the people residing on the Alaskan coast are living in houses placed upon piles driven in the tide flats. This is true even in the case of the larger cities such as Ketchikan, Fort Wrangle, Juneau and other towns. In addition to this small wharves and landing places have been built here and there along the Alaska coast for a variety of purposes and uses. And except in the case of a very few of the larger wharves no one has ever deemed it necessary to consult the Chief of Engineers or the Secretary of War with reference to

these structures. If, however, these structures should be held to come within the meaning of the Rivers and Harbors Act, all these settlers would be guilty of a crime and subject to punishment. Not only is the matter of the construction of this act of importance as far as the persons who have already erected such structures are concerned, but it is also highly important in that it materially affects the future development of the territory. If every man operating in an out of the way place is compelled to prepare plans and submit them to the Chief of Engineers and obtain the consent of the Secretary of War before he can construct a landing place or build a platform with a view of erecting thereon a house or other structure, it will put a stop at least to the work of those who in connection with small operations require the use of such structures, especially where such operations are carried on at remote points. The reasons why this would result are obvious. Clearly this was not the intention of Congress.

A reasonable construction of the act, however, in accordance with the well established rules of statutory construction will not require a submitting of plans to the Chief of Engineers or the Secretary of War for the erection of structures that do not obstruct the navigable capacity of the waters within which they are placed unless these structures are built in harbors, ports, navigable rivers or other like places where they

might prove a nuisance, unless erected in an orderly and systematic manner, and this is as it should be.

Respectfully submitted.

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